(21,285.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 221.

MARGARET E. TAYLOR, IN HER OWN RIGHT AND AS EXECUTRIX OF THOMAS TAYLOR, DECEASED, APPELLANT,

vs.

MARY J. LEESNITZER, ELIZABETH E. PADGETT, AND FRANKLIN C. PADGETT.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., SEPTEMBER 10, 1909.

In the Court of Appeals of the District of Columbia.

No. 1808.

MARGARET E. TAYLOR, &c., Appellant,
vs.
MARY J. LEESNITZER.

a Supreme Court of the District of Columbia.

Equity. No. 26540.

MARY J. LEESNITZER, Complainant,
vs.
ELIZABETH E. PADGETT and FRANKLIN C. PADGETT, Her Husband; MARGARET E. TAYLOR, in Her Own Right and as the Administratrix with the Will Annexed of Thomas Taylor, Deceased, Defendants.

UNITED STATES OF AMERICA, *District of Columbia, ss:*

Be it remembered, that in the Supreme Court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

1 *Bill of Complaint.*

Filed September 10, 1906.

In the Supreme Court of the District of Columbia.

Equity. No. 26540.

MARY J. LEESNITZER, Complainant,
vs.
ELIZABETH E. PADGETT and FRANKLIN C. PADGETT, Her Husband; MARGARET E. TAYLOR, in Her Own Right and as the Administratrix with the Will Annexed of Thomas Taylor, Deceased, Defendants.

To the Supreme Court of the District of Columbia:

The bill of complaint of the said Mary J. Leesnitzer respectfully shows to the Court as follows:

1. That the said complainant is a citizen of the United States and a resident of the District of Columbia, and brings this suit in her own right as one of the heirs at law of Thomas Taylor, deceased.

2. That the defendants Elizabeth E. Padgett and Franklin C. Padgett are citizens of the United States, and are residents of Prince George's County, in the State of Maryland, and that the said Elizabeth E. Padgett is sued as the other heir at law of the said Thomas Taylor, deceased, and that the said Franklin C. Padgett is her husband and is sued as such and in such right as he may ultimately have in the real estate of his said wife hereinafter mentioned
2 and described. That the said defendant Margaret E. Taylor is a citizen of the United States and a resident of the District of Columbia and is sued individually as her interest may hereafter appear, and also as the administratrix with the will annexed of Thomas Taylor, deceased.

3. Whereupon complainant avers that the said Thomas Taylor, a citizen of the United States and a resident of said District of Columbia on the 31st day of December, 1905, died at his home in the City of Washington, District of Columbia without any issue surviving him, but leaving surviving his widow, the said defendant Margaret E. Taylor, and the said complainant Mary J. Leesnitzer and the said defendant Elizabeth E. Padgett, his sisters of the half blood, his only next of kin and heirs at law.

4. That about seventeen years prior to his death, to wit, on the 16th day of September, 1889, the said Thomas Taylor, deceased, made, executed and published his last will and testament, whereby he devised all of his estate real and personal of which he was at that time seized or possessed to the said defendant Margaret E. Taylor, and to her heirs and assigns; and that at the time of the execution of his said will the said Thomas Taylor was seized and possessed of a large amount of valuable real estate and personal property situated in the District of Columbia and elsewhere, which by the terms of his said will, at his death, passed to, and became the property of the said Margaret E. Taylor.

5. That long subsequent to the execution of his said will, the said Thomas Taylor acquired by purchase the fee simple title to
3 other and additional real estate in the District of Columbia, which was not devised by him and did not pass by or under his will, the specific parcels whereof, and the dates of their acquisition by him respectively, are mentioned, set forth and described in the following deeds of conveyance:

(*a*) Deed from Margaret S. Imirie and Peter Imirie her husband to the said Thomas Taylor dated September 17, 1895, recorded September 18, 1895, in Liber No. 2055 folio 84, conveying to him Lot numbered Twenty-eight (28) in James H. Grant's subdivision of Original Lot numbered Six (6) and parts of Original Lots Seven (7) and eight (8) in Square numbered Six hundred and Ninety-seven (697), as said subdivision is recorded in Book No. 13 at page 145 of the Records of the Surveyor's Office of the District of Columbia, a duly certified copy of the record of which deed is herewith filed, marked Complainant's Exhibit A, and is prayed to be taken and read with this bill as a part hereof.

(*b*) Deed from John Beavers and Hattie M. Beavers, his wife, to the said Thomas Taylor, dated November 1, 1901, and recorded

November 2, 1901, in Liber No. 2617 folio 48, conveying to him part of lots lettered A. B. and C. in Walter Clark's Subdivision of lots in Square numbered Two hundred and sixty-four (264) as said subdivision is recorded in the office of the Surveyor of the District of Columbia in Book N. K. page 269, beginning for the same on the line of C Street South at a point twenty-five and sixty-seven hundredths (25 67/100) feet West from the South east corner
4 of said Square and running thence West with the line of C Street sixteen and thirty-one hundredths (16 31/100) feet, thence North forty-nine and fifty hundredths (49 50/100) feet, thence East sixteen and thirty-one hundredths (16 31/100) feet, thence South forty-nine and fifty hundredths (49 50/100) feet to beginning, subject to right of way over the North one (1) foot six (6) inches of said described property to be used in connection with the one (1) foot six (6) inches from the South part of the lot adjoining said property on the North as a three (3) foot alley or passage way, a duly certified copy of the record of which deed is herewith filed marked Complainant's Exhibit B, and is prayed to be taken and read with this bill as a part hereof.

(*c*) Deed from Jane Jones to the said Thomas Taylor, dated June 20, 1904, recorded June 21, 1904, in Liber No. 2830 folio 19 conveying to him the South one-half (½) of original lot numbered five (5) in Square numbered Four hundred and eleven (411), together with the improvements thereon, a duly certified copy of the record of which deed is herewith filed marked Complainant's Exhibit C, and is prayed to be taken and read with this bill as a part hereof.

6. That the said Thomas Taylor at the time of his death was seized in fee simple estate in and to the said several *pra*cels or pieces of real estate, and upon his death the same descended to, and became vested in his said sisters, the said complainant Mary J. Lee-
5 snitzer and the said defendant Elizabeth E. Padgett, his only heirs at law and next of kin, in fee simple estate.

7. That the said complainant Mary J. Leesnitzer is entitled to a partition of the said real estate mentioned and set forth in the fifth paragraph of this bill of complaint; that the said real estate cannot be divided in kind between the complainant and her said sister without loss and injury to them, and that the only method by which partition can be made without such loss or injury will be by this Court decreeing a sale of the said pieces and parcels of real estate, and a division of the money arising from such sale amongst them as tenants in common in equal shares and proportions.

8. That complainant believes and so evers that in addition to the large amount of valuable real estate devised to the said defendant Margaret E. Taylor as aforesaid by the said will, personal property aggregating in value nearly Four thousand ($4,000.00) dollars was also devised to her; and that upon her petition, the Supreme Court of the District of Columbia holding a Probate Court, on the second day of March, 1906, admitted the said will of the said Thomas Taylor, deceased, to probate and record, and granted letters testamentary to her, with the will annexed, upon his estate, no executor having

been nominated in the said will. A duly certified copy of the said last will and testament, together with the order of its probate as herewith filed marked Complainant's Exhibit D, and prayed to be taken and read with this bill as a part hereof. That the said Margaret E. Taylor duly qualified as administratrix with the will annexed
6 upon the said estate by executing the bond prescribed by law, and that the personal estate has come into her possession for administration in due course of law. That the said Thomas Taylor owed no debts, or if any such existed they were small and inconsequential, and that the said personal estate is many times more than ample to pay the same, and that none of the said real estate mentioned in the fifth paragraph of this bill will be required to be administered for the payment of debts.

9. That more than six months have elapsed since administration upon the estate of the said Thomas Taylor, deceased, was granted by the said Probate Court unto the said Margaret E. Taylor, but that no written renunciation nor quit-claim to the bequest and devise to her in the said last will of her said husband contained, nor any election to take in lieu thereof dower, or a legal share in the estate of her said husband, has been made, or filed by her in the said Probate Court, by reason whereof the said Margaret E. Taylor is barred of her right of dower in the said pieces or parcels of real estate mentioned in the fifth paragraph of this bill.

10. The said complainant believes and so avers that the said Margaret E. Taylor, has, since the death of the said Thomas Taylor, received, and collected all the rents, issues and profits arising from the said real estate in the fifth paragraph hereof mentioned, and that she will continue so to do, unless otherwise ordered by this Honorable Court.

7 The premises considered the said complainant prays:

Prayers.

First. That the United States writ of subpœna may issue to the said defendants requiring them to appear and answer the exigencies of this bill, but an answer under oath is hereby waived.

Second. That the said complainant may have partition of the said real estate mentioned in the fifth paragraph of this bill of complaint, and that the Court may decree partition thereof between this complainant and the said Elizabeth E. Padgett as tenants in common of the said real estate; and to that end that the Court decree a sale thereof, and a division of the money arising from such sale among and between them according to their respective rights in equal shares and proportions.

Third. That the said defendant Margaret E. Taylor may be decreed to be forever barred of dower in the land and real estate mentioned and set forth in the fifth paragraph hereof, and that the said real estate be decreed to be sold free of dower.

Fourth. That a collector or receiver be appointed by the Court to receive and collect the rents and income from the said real estate pending the final determination of this cause.

Fifth. That all proper orders may be made and accounts taken herein; and that the complainant may have such other, further and general relief in the premises as the nature of the case may
8 require, and to equity shall seem meet.

MARY J. LEESNITZER, *Complainant.*

The defendants to this bill are:
Elizabeth E. Padgett and Franklin C. Padgett, her husband, and Margaret E. Taylor, individually and as administratrix with the will annexed of Thomas Taylor, deceased.

EDMUND BURKE,
Solicitor for Complainant.

DISTRICT OF COLUMBIA, *To wit:*

On this 10th day of September, 1906, before me at the District of Columbia personally appeared Mary J. Leesnitzer who being by me first duly sworn says that she has read the foregoing bill of complaint by her subscribed and knows the contents thereof; that the facts therein stated upon her personal knowledge are true; and that the facts therein stated upon information and belief she believes to be true.

MARY J. LEESNITZER.

Subscribed and sworn to before me on this 10th day of September, A. D. 1906.

J. R. YOUNG, *Clerk,*
By W. E. WILLIAMS,
Ass't Clerk.

9 "COMPLAINANT'S EXHIBIT A."

Liber 2055, folio 84 *et seq.*

Marguerite S. Imirie *et vir*
to
Thomas Tayler.

Recorded September 18, 1895, 9.19 a. m.

Deed.

This indenture, made this Seventeenth day of September in the year of our Lord one thousand eight hundred and ninety five by and between Marguerite S. Imirie and Peter Imirie her husband of the City of Washington District of Columbia, parties of the first part, and Thomas Tayler of the said City and District party of the second part Witnesseth, that the said parties of the first part for and in consideration of Ten Dollars, lawful money of the United States of America, to them in hand paid by the party of the second part the receipt of which, before the sealing and delivery of these presents

is hereby acknowledged, have given, granted, bargained and sold, aliened, enfeoffed released, conveyed and confirmed and do by these presents give, grant, bargain and sell alien enfeoff, release convey and confirm unto the party of the second part, his heirs and assigns forever, the following described land and premises, situate lying and being in the City of Washington District of Columbia, and distinguished as and being all of Lot numbered Twenty eight (28) in James H. Grant's subdivision of Original Lot numbered Six (6) and parts of Original Lots Seven (7) and eight (8) in Square numbered Six hundred and ninety seven (697) as said Subdivision is recorded in Book No. 13 at page 145 of the Records of the Surveyor's Office of the District of Columbia, Subject however to a certain
10 Deed of Trust from said Marguarite S. Imirie *et vir*, to John Miller and Lewis Hopfermaier Trustees, to secure the payment of a certain promissory note for the sum of Eight hundred ($800.00) Dollars, which said Deed of Trust bears date the 30th day of August, 1892, and is Recorded in Liber 1711 folio 446 of the Land Records for the District of Columbia, together with all and singular the improvements, ways, easements, rights, privileges and appurtenances to the same belonging, or in anywise appertaining, and all the estate, right, title, interest and claim, either at law or in equity or otherwise however, of the parties of the first part, of, in, to or out of the said land and premises to have and to hold the said land premises and appurtenances unto and to the only use of the party of the second part, his heirs and assigns forever. And the said parties of the first part for themselves and for their and each of their heirs, executors and administrators, do hereby covenant and agree to and with the party of the second part, his heirs and assigns, that they the parties of the first part, and their heirs shall and will Warrant and forever defend the said land and premises and appurtenances unto the party of the second part his heirs and assigns from and against the claims of all persons claiming or to claim the same or any part thereof, or interest therein, by, from under or through them or either of them. And Further that the parties of the first part and their heirs shall and will at any and all times hereafter upon the request and at the cost of the party of the second part his heirs and assigns, make and execute all such other Deed or Deeds or other assurance in law for the more certain and effectual
11 conveyance of the said land and premises and appurtenances unto the party of the second part, his heirs or assigns as the party of the second part his heirs, or assigns, or his or their counsel learned in the law shall advise, devise or require. In testimony whereof, the parties of the first part have hereunto set their hands and seals in the day and year first hereinbefore written.

MARGUERITE S. IMIR-E. [SEAL.]
PETER IMIRIE. [SEAL.]

Signed, Sealed and Delivered in the presence of—
JOHN J. WILMARTH.

DISTRICT OF COLUMBIA, *To wit:*

I, John J. Wilmarth, a Notary Public in and for the said District do hereby certify that Marguerite S. Imirie and Peter Imirie, her husband parties to a certain Deed bearing date on the Seventeenth day of September, A. D. 1905, and hereunto annexed, personally appeared before me, in the said District the said Marguerite S. Imirie and Peter Imirie being personally well known to me as the persons who executed the said Deed and acknowledged the same to be their act and deed, and the said Marguerite S. Imirie being by me examined privily and apart from her husband and having the Deed aforesaid fully explained to her by me, acknowledged the same to be her act and deed, and declared that she willingly signed, sealed and delivered the same, and that she wished not to retract it. Given under my hand and official seal, this Seventeenth day of September, A. D. 1895.

[NOTARIAL SEAL.] JOHN J. WILMARTH,
Notary Public, D. C.

12 OFFICE OF RECORDER OF DEEDS,
DISTRICT OF COLUMBIA.

This is to certify that the foregoing is a true and verified copy of an instrument as recorded in Liber 2055, Folio 84, *et seq.*, one of the Land Records of the District of Columbia.

In testimony whereof I have hereunto set my hand and affixed the seal of this office this 6th day of September, A. D. 1906.

[SEAL.] JNO. C. DANCY,
Recorder of Deeds, Dist. of Col.

"COMPLAINANT'S EXHIBIT B."

Liber 2617, folio 48 *et seq.*

John M. Beavers *et ux.*
to
Thomas Taylor.

Recorded November 2, 1901, 11.14 a. m.

Deed.

50 cts. Int. Rev. Stamp Affixed.

This deed, made this first day of November in the year one thousand nine hundred and one, by and between John M. Beavers and Hattie M. Beavers, his wife, of the City of Washington, District of Columbia, parties of the first part and Thomas Taylor of the same City and District party of the second part: Witnesseth That the parties of the first part for and in consideration of Ten 00/100 Dollars lawful money of the United States of America to them in hand paid by the party of the second part, receipt of which, before the

sealing and delivery of these presents, is hereby acknowledged, have given granted, bargained and sold, aliened enfeoffed, released,
13 conveyed and confirmed, and do by these presents give, grant, bargain and sell alien, enfeoff, release convey and confirm unto the party of the second part, his heirs and assigns forever, the following described land and premises, situate, lying and being in the City of Washington District of Columbia and distinguished as Part of lots lettered A. B. and C. in Walter Clark's Subdivision of lots in Square Two hundred and sixty four (264) as said subdivision is recorded in the office of the Surveyor of the District of Columbia in Book N. K. page 269 beginning for the same on the line of C Street South at a point twenty five and sixty-seven hundre-th (25 67/100) feet West from the South east corner of said Square and running thence West with line of C Street sixteen and thirty one hundredth (16 31/100) feet, thence North forty nine and fifty hundredth (49 50/100) feet, thence East sixteen and thirty one hundredth (16 31/100) feet, thence South forty nine and fifty hundredth (49 50/100) feet to beginning, subject to right of way over the North one (1) foot six (6) inches of said described property to be used in connection with the one (1) foot six (6) inches from the South part of the lot adjoining said property on the North as a three (3) foot alley or passage way together with all and singular the improvements, ways, easements, rights, privileges and appurtenances to the same belonging or in anywise appertaining, and all the estate, right, title, interest and claim either at law or in equity, or otherwise however, of the parties of the first part, of, in, to or out of the said land and premises. To have and to hold the said land premises and appurtenances, unto and to the only use of the party
14 of the second part, his heirs and assigns forever. And the said John M. Beavers his heirs executors and administrators, do hereby covenant and agree to and with the party of the second part, his heirs and assigns, that he the party of the first part and his heirs, shall and will Warrant and forever defend the said land and premises and appurtenances unto the party of the second part, his heirs and assigns from and against the claims of all persons claiming or to claim the same, or any part thereof, or interest therein, by, from, under or through him or any of them and further, that the party of the first part and his heirs shall and will at any and all times hereafter, upon the request and at the cost of the party of the second part, his heirs and assigns, make and execute all such other Deed or Deeds, or other assurance in law, for the more certain and effectual conveyance of the said land and premises and appurtenances unto the party of the second part, his heirs or assigns, as the party of the second part, his heirs or assigns, or his or their counsel learned in the law shall advise devise or require. In testimony whereof, said parties of the first part have hereunto set their hands and affixed their seals on the day and year first hereinbefore written.

JOHN M. BEAVERS. [SEAL.]
HATTIE M. BEAVERS. [SEAL.]

Signed, sealed and delivered in the presence of—
FLOYD E. DAVIS.

UNITED STATES OF AMERICA, *District of Columbia, To wit:*

15 I, Floyd E. Davis a Notary Public in and for the said District of Columbia do hereby certify that John M. Beavers and Hattie M. Beavers, his wife, parties to a certain Deed bearing date on the first day of November A. D. 1901 and hereunto annexed, personally appeared before me in the said District of Columbia the said John M. Beavers and Hattie M. Beavers being personally well known to me as the persons who executed the said Deed, and acknowledged the same to be their act and deed and the said Hattie M. Beavers being by me examined privily and apart from her husband and having the Deed aforesaid fully explained to her by me acknowledged the same to be her act and deed and declared that she willingly signed, sealed and delivered the same and that she wished not to retract it. Given under my hand and official seal, this first day of November A. D. 1901.

[NOTARIAL SEAL.] FLOYD E. DAVIS,
Notary Public, D. C.

OFFICE OF RECORDER OF DEEDS,
DISTRICT OF COLUMBIA.

This is to certify that the foregoing is a true and verified copy of an instrument as recorded in Liber 2617, Folio 48, *et seq.*, one of the Land Records of the District of Columbia.

In testimony whereof I have hereunto set my hand and affixed the seal of this office this 6th day of September, A. D. 1906.

[SEAL.] JNO. C. DANCY,
Recorder of Deeds, Dist. of Col.

16 "COMPLAINANT'S EXHIBIT C."

Liber 2830, folio 19 *et seq.*

Jane Jones
to
Thomas Taylor.

Recorded June 21st, A. D. 1904, 12.41 p. m.

Deed.

This deed, made this 20th day of June in the year one thousand nine hundred and four by and between Jane Jones widow, of the City of Washington, District of Columbia, party of the first part, and Thomas Taylor of the same place party of the second part: Witnesseth that in consideration of Ten ($10.00) Dollars, the party of the first part does grant unto the party of the second part in fee simple all that piece or parcel of land in the City of Washington, District of Columbia described as follows, to wit: South one half (½) of original lot numbered five (5) in square numbered Four hundred and eleven (411) together with the improvements, rights,

privileges and appurtenances to the same belonging, or in anywise appertaining thereto, and the said party of the first part covenants that she will Warrant specially the property hereby conveyed that she has done no act to incumber said land and that she will execute such further assurances of said land as may be requisite.

Witness my hand and seal the day and year hereinbefore written.

JANE JONES. [SEAL.]

In presence of—
HARRY S. WELCH.

DISTRICT OF COLUMBIA, *To wit:*

17 I, Harry S. Welch a notary public in and for the District of Columbia, do hereby certify that Jane Jones of the City of Washington, District of Columbia party to a certain Deed bearing date on the 20th day of June 1904, and hereto annexed personally appeared before me in said District the said Jane Jones being personally well known to me as the person who executed the said Deed, and acknowledged the same to be her act and deed. Given under my hand and seal this 20th day of June 1904.

[NOTARIAL SEAL.] HARRY S. WELCH,
Notary Public, D. C.

OFFICE OF RECORDER OF DEEDS,
DISTRICT OF COLUMBIA.

This is to certify that the foregoing is a true and verified copy of an instrument as recorded in Liber 2830, Folio 19, *et seq.*, one of the Land Records of the District of Columbia.

In testimony whereof I have hereunto set my hand and affixed the seal of this office this 6th day of September, A. D. 1906.

[SEAL.] JNO. C. DANCY,
Recorder of Deeds, Dist. of Col.

"COMPLAINANT'S EXHIBIT D."

In the name of God, Amen—I, Thos. Taylor, of the City of Washington in the District of Columbia, being of sound and disposing mind and memory, considering the certainty of death and the
18 uncertainty of the time thereof, do make, publish and declare this my last will and testament, hereby revoking all former wills by me at any time made.

I commit my soul to Almighty God, and my body to the earth, to be decently buried at the discretion of my executrix hereinafter named, and after the payment of all my just debts, including the expenses of my last sickness and my funeral, I give, devise, and bequeath unto my dearly beloved wife Margaret E. Taylor, her heirs and assigns all of my estate both real and personal.

I nominate, constitute and appoint my dearly beloved wife Margaret E. Taylor executrix of this my last will and testament and request that no bond be required of her as such.

In testimony of all of which I have hereunto set my hand and seal this 16th day of September in the year of our Lord one thousand eight hundred and eighty-nine.

THOMAS TAYLOR. [SEAL.]

Signed, published and declared by the within named testator, Thos. Taylor, as and for his last will and testament, in the presence of us, who, at his request and in his presence, and in the presence of one another, have subscribed our names as witnesses thereto.

OLIVER T. THOMPSON,
475 *Md. Ave. S. W.*
SUSAN E. THOMPSON,
462 *Md. Ave. S. W.*
WM. A. THOMPSON,
462 *Md. Ave. S. W.*

Complainant's Exhibit A (as offered in testimony).
EDWIN L. WILSON, *Examiner.*

19 In the Supreme Court of the District of Columbia, Holding Probate Court.

In re Estate of THOMAS TAYLOR, Deceased.

Upon consideration of the petition of Margaret E. Taylor, filed herein, and the will of the decedent having been filed and its execution proven by the oath of the surviving subscribing witness thereto, Susan E. Thompson, and the signatures of the other witnesses and the fact of their being deceased having been proved by the oath of Louisiana Yeates, it is, this 2d day of March, A. D. 1906, adjudged, ordered and decreed that said will be, and the same is hereby, admitted to probate and record, both as to real-estate and personal property, and that Letters Testamentary issue to the said Margaret E. Taylor, the executrix nominated in said will, upon her giving bond in the penalty of five hundred dollars conditioned for paying all just debts of, and claims against, the deceased, and also all damages that may be recovered against her as executrix.

WENDELL P. STAFFORD,
Associate Justice.

Supreme Court of the District of Columbia, Holding a Probate Court.

DISTRICT OF COLUMBIA, *To wit:*

20 I, Wm. C. Taylor, Deputy Register of Wills for the District of Columbia, Clerk of the Probate Court, do hereby certify, That the foregoing are true copies of the original will of Thomas Taylor, deceased, and of the decree of said Court admitting the same to Probate and record, as filed and recorded in the office

of the Register of Wills for the District of Columbia, Clerk of the Probate Court aforesaid;

I further certify, That I have compared the foregoing copies with the original records in said office, and find them to be full, true and correct transcripts thereof.

Witness my hand and the seal of the said Probate Court, this 17th day of July, A. D. 1906.

[SEAL.] WM. C. TAYLOR,
Deputy Register of Wills for the District of Columbia,
Clerk of the Probate Court.

Demurrer of Defendant Margaret E. Taylor.

Filed October 3, 1906.

In the Supreme Court of the District of Columbia.

No. 26540. Equity.

MARY J. LEESNITZER, Complainant,
vs.
ELIZABETH E. PADGETT ET AL., Defendants.

21 The defendant Margaret E. Taylor, in her own right, and as executrix, erroneously described in the bill as administratrix with the will annexed, of Thomas Taylor, deceased, demurs to the bill in the above entitled cause, and for cause of demurrer, shows that it appears by the complainant's own showing by her said bill made that she is not entitled to the discovery or relief prayed by the said bill against this defendant.

Wherefore, and for divers other good causes of demurrer, appearing in the said bill, this defendant demurs thereto and prays the judgment of the court whether she shall be required to make any answer thereto.

J. J. DARLINGTON,
J. NOTA McGILL,
Solicitors for Defendant, Margaret E. Taylor.

Undersigned counsel for the defendant Margaret E. Taylor certify that in their opinion the foregoing demurrer is well founded in law.

J. J. DARLINGTON,
J. NOTA McGILL,
Solicitors for Margaret E. Taylor.

DISTRICT OF COLUMBIA, *ss:*

I, Margaret E. Taylor, on oath say that the foregoing demurrer is not interposed for delay.

MARGARET E. TAYLOR.

Subscribed and sworn to before me, a Notary Public, this first day of October, A. D. 1906.

[SEAL.] FRANCIS S. MAGUIRE,
Notary Public.

22 *Answer of Elizabeth E. Padgett and Franklin C. Padgett.*

Filed December 26, 1906.

In the Supreme Court of the District of Columbia.

Equity. No. 26540.

MARY J. LEESNITZER, Complainant,
vs.
ELIZABETH E. PADGETT ET AL., Defendants.

The defendants for answer to said bill jointly and severally say:

1. These defendants do jointly and severally admit the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 9th and 10th paragraphs of the bill as therein stated and set forth, and they also admit all of paragraph 8th of said bill, except in so far as it is alleged in said paragraph that letters testamentary were granted to the said Margaret E. Taylor with the will annexed upon the estate of Thomas Taylor, deceased and that no executor has been nominated in said will. These defendants say that the said defendant Margaret E. Taylor was nominated as such executrix by the said will and duly qualified as such in the Probate Court in the manner prescribed by law, and that letters testamentary were duly issued to her by said Court.

And having fully answered said bill of complaint they pray &c.

ELIZABETH E. PADGETT.
FRANKLIN C. PADGETT.

23 *Joinder of Issue.*

Filed December 26, 1906.

In the Supreme Court of the District of Columbia.

Equity. No. 26540.

MARY J. LEESNITZER, Complainant,
vs.
ELIZABETH E. PADGETT ET AL., Defendants.

The complainant hereby joins issue with the defendants Elizabeth E. Padgett and Franklin C. Padgett.

EDMUND BURKE,
Solicitor for Complainant.

Decree.

Filed January 8, 1907.

In the Supreme Court of the District of Columbia.

Equity. No. 26540.

MARY J. LEESNITZER, Complainant,
vs.
ELIZABETH E. PADGETT ET AL., Defendants.

This cause coming on to be heard upon the demurrer of the defendant Margaret E. Taylor to the complainant's bill, and counsel for the defendant Margaret E. Taylor having in open court
24 waived all objections to the said bill in so far as the said bill incorrectly alleges that no executrix was nominated in the said will and that the said defendant qualified as administratrix with the will annexed of Thomas Taylor, deceased, and said counsel for said defendant agreeing that the said bill shall be treated and considered by the Court as amended so as to aver that the said defendant was nominated as the executrix by the said will and duly qualified as such according to the fact as shown by the complainant's Exhibit "D" filed with the bill of complaint and made a part thereof, and thereupon the said demurrer was argued by counsel, on consideration whereof it is by the Court on this 8th day of January, A. D. 1907, adjudged, ordered and decreed that the said demurrer be and the same is hereby overruled at the cost of the said Margaret E. Taylor; and the said Margaret E. Taylor having by her solicitor of record elected to stand on her said demurrer, and waived her right to plead over or answer the bill, the complainant is at liberty to take her proof in this cause.

HARRY M. CLABAUGH,
Chief Justice.

Testimony on Behalf of the Complainant.

Filed March 27, 1907.

In the Supreme Court of the District of Columbia, Holding an Equity Court for said District.

Equity. No. —.

LEESNITZER
vs.
PADGETT ET AL.

25 Please take notice that I shall take testimony for and on behalf of the complainant in the above entitled cause, on

Friday, January 18th, 1907, at 11 o'clock A. M., at my office in the Fendall Building, pursuant to request of counsel for complainant. You are invited to be present and take such action as you may be advised.

EDWIN L. WILSON, *Examiner.*

To Messrs, J. J. Darlington and J. Nota McGill, Attorneys for certain defendants.

Copy of above notice served on counsel for defendants this 14th day of January, 1907.

EDWIN L. WILSON.

WASHINGTON, D. C., *January 18th*, 1907—
Friday, at 11 o'clock a. m.

Met pursuant to notice hereto attached at the offices of the Examiner, in the Fendall Building, for the purpose of taking testimony for and on behalf of the heirs of Thomas Taylor, deceased.

Present: Mr. Edmund Burke for the heirs of Thomas Taylor, deceased; Mr. J. Nota McGill, on behalf of the defendant, Margaret Taylor; Mr. Edwin L. Wilson, Examiner, and witness.

Whereupon WILLIAM C. TAYLOR, a witness produced on
26 behalf of the complainants, and after being duly sworn according to law, testified as follows:

By Mr. BURKE:

Q. State your name and residence? A. William C. Taylor; residence, Washington, D. C.

Q. What official position do you hold? A. Deputy Register of Wills for the District of Columbia.

Q. Look at the paper now shown you and please state what it is, if you know? A. This is a certified copy of the will of Thomas Taylor, deceased.

Q. Of record in the office of Register of Wills? A. Yes, sir, in the office of Register of Wills.

Mr. BURKE: I offer this certified copy of the will of Thomas Taylor, deceased, in evidence together with the duly certified copy of the order admitting the same to probate in the Probate Court of the District of Columbia for the purpose, among other things, of showing the date of the execution of said will, the same having been heretofore filed in this cause, and to be read with the deposition of Mr. Taylor. Exhibit A.

Q. Have you made an examination today of the papers on file in the matter of the estate of Thomas Taylor, deceased, the same being No. 13391 in the Probate Court of the District of Columbia? A. Yes, sir.

Q. Have you those papers now present with you? A.
27 Yes, sir.

Q. Have you also made an examination of the docket entries in said matter? A. Yes, sir.

Q. Have you a copy with you of said docket entries? A. Yes, sir.

Q. Please produce the same?

(Hereupon the witness produced a certified copy of the docket entries called for.)

Mr BURKE: I offer in evidence the certified copy of the docket entries called for and ask that they be marked Complainant's Exhibit B to be read with the deposition of William C. Taylor.

Q. Will you now state from an examination of the docket entries made by you on this day and from an examination of the original papers, which you now have present here, whether or not the widow of Thomas Taylor, deceased, has filed in the Probate Court any renunciation whatever of the provisions made for her by the will of Thomas Taylor, deceased? A. No, sir, she has not.

Mr. MCGILL: No cross-examination.

WM. C. TAYLOR.

Signed for the witness by me by consent and agreement of counsel, this 26th day of March, 1907.

EDWIN L. WILSON, *Examiner.*

28 Mr. BURKE: I now offer in evidence a duly certified copy of deed from Margaret Imirie, and husband, to Thomas Taylor dated September 17th, 1895, and recorded in the office of the Recorder of Deeds of the District of Columbia on the 18th day of September, 1895, and recorded in liber 2055, folio 84, *et seq.*, the same being Complainant's Exhibit A filed with the bill.

I also offer in evidence a duly certified copy of another deed from John M. Beavers, and wife, to Thomas Taylor, dated November 1st, 1901, and recorded November 2nd, 1901, in liber 2617, folio 48, *et seq.*, the same being Complainant's Exhibit B filed with the bill.

I also offer in evidence a duly certified copy of another deed from Jane Jones to Thomas Taylor, dated June 20th, 1904, recorded June 21st, 1904, in liber 2830, folio 19 *et seq.*, the same being Complainant's Exhibit C and filed with the bill in this cause.

I offer these deeds in evidence for the purpose, among other things, of showing; first, that Thomas Taylor, deceased, acquired the property mentioned in these deeds subsequent to the execution of his will, and, secondly, for the purpose of showing that he acquired the property mentioned in said deeds by purchase and not by descent.

Hereupon the further taking of testimony in this cause and on this behalf was adjourned until Monday, January 21st, 1907, to meet at the same place.

EDWIN L. WILSON, *Examiner.*

29 WASHINGTON, D. C., *January 21st*, 1907—
Monday, at 1 o'clock p. m.

Met pursuant to adjournment as next hereinbefore noted at the same place for the purpose of taking additional testimony for and

on behalf of the complainants, and heirs at law of Thomas Taylor, deceased.

Present: Mr. Edmund Burke for the heirs at law of Thomas Taylor, deceased; Mr. J. Nota McGill for the defendant, Margaret Taylor, Examiner and witnesses.

Whereupon Mrs. ELIZABETH E. PADGETT, being produced as a witness on her own behalf and other heirs of Thomas Taylor, deceased, and after being first duly sworn according to law, testified as follows:

By Mr. BURKE:

Q. State your name, age and residence? A. My name is Elizabeth E. Padgett; residence, Mellwood.

Q. Where? A. Prince George's County, Maryland; post office address, Upper Marlboro.

Q. What is your age? A. My age, fifty-seven.

Q. How are you related to the late Thomas Taylor? A. Half sister.

Q. Was he the child of the first marriage of your mother
30 or the second marriage? A. First.

Q. What was his age when he died, if you know? A. I think somewheres about sixty-seven—sixty-six or sixty-seven. Sixty-six I guess.

Q. How many children did your mother have? A. Four altogether.

Q. How many by her first husband? A. One.

Q. Who was that? A. Mr. Thomas Taylor.

Q. State the names of the three remaining children by her second husband? A. My brother, William Messer, and then Mrs. Mary J. Leesnitzer and myself. My brother was the eldest.

Q. What was your brother's name? A. William Messer.

Q. Your mother's first husband was then Taylor, as I understand it, Thomas Taylor? A. Yes, sir.

Q. And her second husband, your father, was who? A. Andrew Messer.

Q. What became of your brother? A. My own brother?

Q. What is his name? A. William Messer.

Q. What became of your brother, William Messer? A. He was killed at the Sixth Street station.

Q. Did he leave any children? A. He left one, but it is
31 dead.

Q. When did he die? A. It was 1886 or thereabouts.

Q. State whether or not the father of Thomas Taylor, your half brother, is dead or not? A. He is dead.

Q. There are three pieces of property mentioned in the bill or petition filed in this case, and I will ask you if the property can be divided by lots without loss, or would it be necessary to have a sale of these three pieces of property for the purposes of making a partition or division? A. I should think it would be necessary to have a sale for partition.

Q. Thomas Taylor, deceased, left no brothers or sisters of the whole blood? A. No, sir.

Q. His father and mother are dead, are they not? A. Yes, sir.

Q. And grandfather and grandmother? A. I suppose they are, as far as I know.

Q. Did he leave any children surviving him? A. No, sir.

Q. Did he leave a widow surviving him? A. Yes, sir.

Q. What was her name? A. Margaret E. Taylor.

Q. Do you know of any property left by Thomas E. Taylor other than that mentioned in this suit? A. I do not. He is in-
32 terested in my father's old home place in Prince George's County. He and his partner purchased it.

Q. You do not know what other property he owned in his lifetime in the District of Columbia except these three pieces? A. No, sir, I do not know. I am not posted.

Q. State the date of the death of your brother, Thomas Taylor? A. The 31st day of December, 1905.

Cross-examination.

By Mr. McGILL:

Q. When did Andrew Messer die?

Mr. BURKE: I want to put an objection. Counsel for the heirs of Thomas Taylor, deceased, objects to the cross examination of the witness, or the cross examination of any witness in this cause, that may be introduced for the purpose of sustaining the allegations of the bill, for the reason that the only counsel appearing in this cause, except the solicitor for the heirs, represent the widow, Margaret E. Taylor, who has filed her demurrer in this cause, and which stands overruled, and she has elected to stand upon the said demurrer and has waived her right to file any answer in the cause, and therefore there is no issue of fact raised in this cause between the heirs of Thomas Taylor, deceased, parties to this suit, and the said Margaret E. Taylor.

Mr. McGILL: That will apply to all questions?

Mr. BURKE: Yes, sir.

33 Q. Now you can answer, when did Andrew Messer die? A. About four years ago. He has been dead about that long. I cannot directly remember the date.

Q. You are quite sure that he died before Mr. Thomas Taylor? A. Yes, sir.

Q. When did your mother die? A. My mother died in '67.

Q. Where were your mother and father married. A. In Scotland.

Q. And the year? A. Well, I cannot directly tell you about the year.

Q. You just cannot recall the year? A. No, sir.

ELIZABETH E. PADGETT.

Signed for the witness by me by consent and agreement of counsel, this 26th day of March, 1907.

EDWIN L. WILSON, *Examiner.*

MARY J. LEESNITZER, the complainant, produced on her own behalf and also on behalf of the other heirs of Thomas Taylor, deceased, and after being duly sworn according to law, testified as follows:

By Mr. BURKE:

Q. State your name and residence and also your age? A. Mary J. Leesnitzer; 12 S street Northwest, Washington, D. C.

34 Q. And your age is what? A. Fifty-four.

Q. How were you related to the late Thomas Taylor? A. Half sister.

Q. Is his father or mother living? A. No, sir.

Q. Is his grandfather or grandmother living? A. I think not

Q. Did he leave any brothers or sisters at the time of his death except yourself and Mrs. Elizabeth E. Padgett, who has just testified in this cause? A. No, sir.

Q. Did he leave any children surviving him? A. No, sir.

Q. Did he leave a widow surviving him? A. Yes, sir.

Q. Will you state her name? A. Margaret E. Taylor.

Q. How often was your mother married? A. Twice.

Q. State the name of her first husband. A. Thomas Taylor.

Q. And was he the father of Thomas Taylor, deceased? A. He was.

Q. What was the name of her second husband, your father? A. *Andrew Messer.*

35 Q. How many children did she have by the second marriage? A. Three.

Q. Name them? A. William Messer, Elizabeth E. and myself.

Q. Elizabeth E., now Padgett? A. Yes sir, and myself, Mary J. Leesnitzer.

Q. Is William Messer alive or dead? A. Dead.

Q. When did he die? A. 1886, I think; December 5th.

Q. Did he leave any children? A. One.

Q. Is that child alive or dead? A. Dead.

Q. How long has it been dead? A. It died the following year of his death.

Q. From your knowledge and information concerning the three pieces of property involved in this suit, would a sale of it be necessary for the purposes of having a division of the proceeds without money loss to the sister? A. In my judgment it would.

Q. Is your mother, who is also the mother of Thomas Taylor, dead or alive? A. Dead.

Q. How long has she been dead? A. Since 1879.

Q. Is the father of Thomas Taylor also dead? A. Yes, sir, he is.

36 Q. Do you know how many years he has been dead? A. No, sir, I do not.

Mr. MCGILL: No cross examination.

MARY J. LEESNITZER.

Signed for the witness by me by consent and agreement of counsel, this 26th day of March 1907.

EDWIN L. WILSON, *Examiner.*

Hereupon the further taking of testimony in this cause and on behalf of the heirs of Thomas Taylor, deceased, was adjourned subject to notice or agreement of counsel.

EDWIN L. WILSON, *Examiner.*

WASHINGTON, D. C., *March 25th,* 1907.

Met pursuant to agreement of counsel at the same place for the purpose of taking additional testimony on behalf of the complainants.

Present: Mr. Edmund Burke for the complainants; Mr. J. Nota McGill for the defendant, Margaret Taylor; Examiner and witnesses.

MARY J. LEESNITZER, recalled, on behalf of the complainants, and testified as follows:

By Mr. BURKE:

Q. Have you a record of the death of your father and your brother, William Messer, and his son, William Burns Messer,
37 and Thomas Taylor, and his only child by his first wife, James B. Taylor? A. Yes, sir.

Q. Have you taken a memorandum from the record which you have? A. Yes, sir.

Q. Now, will you please state the deaths of those people? A. Thomas Taylor died December 31st, 1905; James B. Taylor, his only child, died March 12th, 1876, and William Messer, my brother, died December 5th, 1882.

Q. Where? A. In Washington.

Q. Were all these deaths in Washington, D. C., that you have mentioned? A. Yes, sir.

Q. And your father? A. William Burns Messer, my brother's only child, died June 28th, 1883.

Q. Now, your father? A. My father, Andrew Messer, died at Suffolk, Virginia, January 14th, 1901.

Q. You might put the date of your mother's death there also. A. My mother's death?

Q. Yes. A. Isabella Messer died at Silver Hill, Maryland, April 7th, 1879.

MARY J. LEESNITZER.

38 Signed for the witness by me by consent and agreement of counsel, this 26th day of March, 1907.

EDWIN L. WILSON, *Examiner.*

Mr. BURKE: I now offer in evidence a certificate of assessment from the office of the Assessor of the District of Columbia showing by the records of the Assessor's office of the District of Columbia that

the several pieces of real estate with improvements thereon mentioned in the bill, and the deeds filed as exhibits therewith, amount in all to the sum of $3410.00. This certificate is under the seal of the Assessor's Office of the District of Columbia and is signed by Louis C. Wilson, Assistant Assessor of the District of Columbia. This certificate is marked complainant's exhibit No. C.

Mr. McGILL: I want to enter an objection to the offer. Counsel for Margaret Taylor objects to this exhibit as incompetent, irrelevant and immaterial.

JOHN J. BYRNE, produced as a witness on behalf of the complainants, and after being duly sworn, testified as follows:

By Mr. BURKE:

Q. State your name, residence and occupation? A. Residence, 2120 Pennsylvania Avenue; real estate business.

Q. And name? A. John J. Byrne.

39 Q. How long have you been engaged in the real estate business in the District of Columbia? A. Twelve or fifteen years.

Q. Have you recently examined the property No. 1303 C street, Southwest, in the city of Washington, District of Columbia, being parts of sub-lots A, B and C, in square 264? A. Yes, sir; I have.

Q. Did you examine it with a view to placing a valuation upon the said property? A. I did.

Q. At whose request? A. Yours.

Q. Who else examined it with you, if any one, at the same time? A. Mr. Lowe.

Q. Who is Mr. Lowe? A. He is in the real estate business on 14th street between F and G In the Stewart building there I think.

Q. What valuation did you yourself and Mr. Lowe place upon those lots A, B and C?

Mr. McGILL: Objected to as incompetent, irrelevant and immaterial.

A. $2400.00 on that 1303.

Q. Did you also examine the south half of lot 5, square 411, being 450 9th Street, southwest? A. Yes, sir; I did.

Q. Do you remember the frontage of that lot? A. 12½ feet.

40 Q. What was the valuation placed on that lot by yourself and Mr. Lowe?

Mr. McGILL: Same objection.

A. Sixteen hundred dollars.

Q. Did you also visit and examine sub-lot 28, square 697, No. 1028 South Capitol Street, Southwest? A. I did.

Q. What valuation did you yourself and Mr. Lowe place upon said lot?

Mr. McGILL: Same objection.

A. I placed $750.00.

Q. What was the valuation placed upon it by Mr. Lowe?

Mr. McGILL: Same objection.

A. $800.00.

Q. What was the total valuation placed upon those lots and improvements?

Mr. McGILL: Same objection.

A. $4750.00.

Q. What was the total valuation placed upon those lots by Mr. Lowe?

Mr. McGILL: Same objection.

A. $4800.00. His valuation was $50.00 more than mine.

Q. When did you visit the property and form your estimates? A. Last Thursday.

Mr. BURKE: That is all.

Mr. McGILL: Counsel for the defendant, Margaret Taylor, waives cross examination and moves that the entire deposition of
41 this witness be stricken from the record as being incompetent, irrelevant and immaterial. I now give notice of my intention to make a motion at the proper time that such deposition be stricken out.

JOHN J. BYRNE.

Signed for the witness by me by consent and agreement of counsel, this 26th day of March, 1907.

EDWIN L. WILSON, *Examiner.*

Hereupon counsel for the complainants announced his case closed.

COMPLAINANT'S EXHIBIT B (as Offered in the Testimony).

Supreme Court of the District of Columbia.

Probate Court.

Estate of THOMAS TAYLOR.

Legal representatives.
Margaret E. Taylor, Executrix.

Domicil District of Columbia.
Date of Death Dec. 31–1905.
Bond $500. Special.
Surety John Imirie.
Solicitors for Estate—Will Francis S. Maguire. Edmund Burke Att'y for Mary A. Leisnitzer and Elizabeth Padgette.

Date.	Proceedings.
1906.	
Jan. 8.	Will dated Sept. 16–1889 naming Margaret E. Taylor, executrix, filed.
42	
Jan. 8.	Affidavit in relation to will, filed.
"	Petition of Margaret E. Taylor for probate and record of will as to real and personal estate and for letters testamentary, filed.
"	Summons issued *vs.* Mary Leisnitzer *et al.* Returnable Jan. 22–1906.
22.	Summons issued *vs.* Mary Leisnitzer returned served and returned not to be found as to Elizabeth Padgette.
23.	Order of publication issued in the Wash'n Law Reporter and the Wash'n Times Returnable 2/26/06.
Feb. 24.	Proof — publication in the Wash'n Law Reporter and the Wash'n Times, filed.
"	Affidavit of Francis S. Maguire as to mailing copies of order of publication, filed.
26.	Will proved by one witness and death of two witnesses proved.
"	Handwriting of deceased witnesses proved by Louisiana Yates.
M'ch 2.	Order admitting will to probate and record as to real and personal estate and granting letters testamentary to Margaret E. Taylor. Sp'l Bond $500.
2.	Oath of executrix.
"	Oath of surety.
"	Bond executed.
5.	Bond approved and letters issued. Special Bonds # 4 f–829.

Supreme Court of the District of Columbia, Holding a Probate Court.

DISTRICT OF COLUMBIA, *To wit:*

43 I, Wm. C. Taylor, Deputy Register of Wills for the District of Columbia, Clerk of the Probate Court, do hereby certify, That the foregoing is a true copy of the original Docket entries of record in the office of the Register of Wills for the District of Columbia, Clerk of the Probate Court, in the matter of the estate of Thomas Taylor, deceased, Case No. 13,391, Adm. Doc. 34.

I further certify, That I have compared said copy with the original records in said office, and find it to be a full, true and correct transcript thereof.

Witness my hand and the seal of the said Probate Court, this 15th day of January, A. D. 1907.

[SEAL.]

W. C. TAYLOR,
Deputy Register of Wills for the District of Columbia, Clerk of the Probate Court.

COMPLAINANT'S EXHIBIT C (with Testimony).

Certificate of Assessment.

OFFICE OF THE ASSESSOR,
DISTRICT OF COLUMBIA,
WASHINGTON, *March 4th*, 1907.

This is to certify, That Real Estate to the amount of Three thousand, four hundred and ten Dollars, is assessed on the books of this office in the name of Thomas Taylor Sp. 264 parts sub lots A, B and C, Sq. 411 S. ½ lot 5, Sp. 697 sub 28 $3,410.00.

[SEAL.] LOUIS C. WILSON,
Ass't Assessor, D. C.

G.

44 *Testimony on Behalf of the Defendant, Margaret E. Taylor.*

Filed April 2, 1907.

In the Supreme Court of the District of Columbia, Holding an Equity Court.

Equity. No. 26540.

MARY J. LEESNITZER
vs.
ELIZABETH E. PADGETT ET AL.

WASHINGTON, D. C., *March 30th*, 1907.

Met pursuant to notice to counsel for the complainant at the offices of Edwin L. Wilson, Esq., Fendall Building, for the purpose of taking testimony for and on behalf of the defendant, Margaret E. Taylor.

Present: J. Nota McGill, Esq., for the defendant, Margaret E. Taylor; no appearance on behalf of the complainant; Examiner and witnesses.

FLOYD E. DAVIS, a witness produced on behalf of the defendant, Margaret E. Taylor, and being duly sworn, testified as follows:

By Mr. MCGILL:

Q. Mr. Davis, what is your business? A. Real estate agent.

Q. How long have you been in the real estate business?

45 A. About fifteen years.

Q. Is it any part of your business to appraise or estimate the value of improved and unimproved real estate in the District of Columbia? A. It is.

Q. Are you acquainted with the property known as No. 1303 C Street, southwest, in the city of Washington, District of Columbia, being parts of sub-lots A, B and C, in square 264? A. I am.

Q. Is that property improved or unimproved, and if improved, what is the nature of the improvements? A. It is improved by a two story basement brick house.

Q. Do you know for what that property rents? A. I do; $20.30 per month.

Q. What in your judgment is the fair market value of No. 1303 C street, southwest? A. $3,000.00.

Q. State whether or not you have recently examined this property with the view of forming your opinion as to its valuation? A. Yes, sir.

Q. Have you also examined premises No. 450 9th Street, Southwest, being the south half of lot 5, square 411; and if yea, state whether or not such property is improved, and the nature of the improvement, if any? A. Yes, sir; I have, and it is improved by a two story brick dwelling.

46 Q. State the rental value of that property? A. It rents for $16.50 per month.

Q. What do you think is the fair market value of this property number 450 9th Street, Southwest? A. From $2,000.00 to $2100.00.

Q. Have you also examined premises number 1028 South Capitol street, being sub-lot 28, square 697; and if yea, state whether or not the same is improved, and the nature of the improvement, if any? A. I have, and it is improved by a two story brick dwelling.

Q. And what is the rental value of that property? A. $8.30 per month.

Q. What do you regard as the fair market value of this property number 1028 South Capitol street? A. $1,000.00.

Q. Mr. Davis, please state whether or not these several pieces of property as to which you have testified are occupied by tenants? A. They are.

Q. What is the condition of the houses on these several pieces of property? A. In fair tenantable condition.

Q. Then, as I understand your testimony, you regard these several pieces of property as being worth between $6,000.00 and $6,100.00. Am I correct? A. You are.

FLOYD E. DAVIS.

Subscribed and sworn to before me this 2nd day of April,
47 A. D. 1907.

EDWIN L. WILSON, *Examiner.*

JAMES F. SHEA, produced as a witness on the same behalf, and being duly sworn, testified as follows:

By Mr. MCGILL:

Q. What is your business, Mr. Shea? A. I am a real estate broker.

Q. How long have you been engaged in that business? A. About fourteen years.

Q. Is it any part of your business to appraise or estimate the value of improved and unimproved real property in the District of Columbia? A. I am one of the appraisers of the Home Savings Bank, and also secretary of a building association and that, in addition to my own business, has given me work along those lines.

Q. You reside in the southwestern portion of the city? A. I do.

Q. Are you familiar with the values of real estate in that portion of the District of Columbia? A. I am.

Q. Have you examined premises number 1303 C street, southwest, in the city of Washington, being parts of sublots A, B and C, in square 264; and if yea, please state whether or not the same is improved, and the nature of the improvement, if any? A. I
48 examined the premises yesterday. It is improved by a two story and basement brick dwelling, six rooms and bath.

Q. What do you regard as a fair market value of the premises number 1303 C street, southwest? A. $2750.00 or $2800.00.

Q. Have you also examined the premises number 450 9th street, southwest, being the south half of lot 5, in square 411, in the city of Washington; and if yea, please state whether or not the same is improved, and the nature of the improvement, if any? A. I examined premises number 450 9th street, southwest yesterday, which is a two story brick dwelling, six rooms, and renting for $16.00 as I was informed by the tenant.

Q. What would you regard as the fair market value of the premises number 450 9th street, southwest? A. $1800.00.

Q. Have you also examined the premises number 1028 South Capitol street, being sub-lot 28, square 697, in the city of Washington; and if yea, state whether or not the same is improved, and the nature of the improvements, if any? A. I examined the premises number 1028 South Capitol street yesterday, which is a two story brick dwelling of five rooms.

Q. What do you regard as the fair market value of the premises number 1028 South Capitol street? A. $950.00.

49 Q. Did you notice whether or not these several pieces of properties were occupied by tenants? A. They are all occupied by tenants.

Q. State generally the condition of the several pieces of property? A. 1303 C street is in good condition. 450 9th street, southwest, is in good condition. 1028 South Capitol street is in need of some minor repairs such as fencing and wood work.

Q. Then, as I understand your testimony, you would place the fair market value of these several pieces of property at between $5,500.00 and $5,550.00. Am I correct? A. Yes, sir.

JAMES F. SHEA.

Subscribed and sworn to before me this 2nd day of April, A. D. 1907.

EDWIN L. WILSON, *Examiner.*

CHARLES L. SELECMAN, a witness produced on the same behalf, and after being duly sworn, testified as follows:

By Mr. McGILL:

Q. What is your business, Mr. Selecman? A. Real estate.

Q. How long have you been engaged in that business? A. About eight or nine years.

50 Q. Are you connected with any firm or in business for yourself? A. I am connected with Stone and Fairfax.

Q. Is it any part of your business to appraise or estimate the value of improved and unimproved real property in the District of Columbia? A. Yes, sir; it comes under the business, and I have had considerable experience in that line.

Q. Have you recently examined the premises number 1303 C street, southwest, in the city of Washington, District of Columbia, being parts of sub-lots A, B and C, in square 264; and if yea, state whether or not the same is improved, and the nature of the improvement, if any? A. Yes, sir; I inspected that house. It is a two story basement brick, bay window, six rooms and bath. The house is well built.

Q. Did you examine it with a view to placing a valuation upon this property? A. I did.

Q. What do you regard as a fair market value of the premises number 1303 C street, southwest? A. $3,000.00.

Q. Is that property occupied? A. It is.

Q. Have you also examined the premises number 450 9th street, southwest, being the south half of lot 5, square 411, in the city of Washington; and if yea, state whether or not such property

51 is improved, and the nature of the improvements, if any? A. I did. It is a two story brick, six rooms, water and sewer and runs through to an alley. The house is in very good condition and has an excellent tenant.

Q. What would you regard as the fair market value of this property number 450 9th street, southwest? A. $2,000.00.

Q. Have you also examined the premises number 1028 South Capitol street, southwest, being sub-lot 28, square 697, in the city of Washington; and if yea, state whether or not the same is improved, and the nature of the improvements, if any? A. I did. It is a two story house with a brick front.

Q. Is it occupied? A. It is.

Q. What do you regard as the fair market value of this property? A. $1,000.00.

Q. Then, as I understand you, in your judgment the fair market value of these several pieces of property amounts to $6,000.00. Am I correct? A. That is right.

Q. Upon what do you mainly base your judgment as to the valuation of these several pieces of property? A. The character of the building and the income it brings.

Q. Are you aware of the income from the several pieces of property? A. Yes, sir.

52 Q. You have no interest in this matter, Mr. Selecman? A. None at all.

CHAS. L. SELECMAN.

Subscribed and sworn to before me this 2nd day of April, A. D. 1907.

EDWIN L. WILSON, *Examiner.*

RALPH L. HALL, a witness produced on the same behalf, and after being duly sworn, testified as follows:

By Mr. McGILL:

Q. Mr. Hall, what is your business? A. I am a member of the corporation of Stone and Fairfax, real estate brokers.

Q. How long have you been engaged in that line of business? A. I think in the neighborhood of ten years.

Q. Did you hear the testimony of Mr. C. L. Selecman which has just been given? A. I did.

Q. State whether or not you accompanied him on the occasion of his visits to the several pieces of property, numbers 1303 C street, southwest; 450 9th street, southwest, and 1028 South Capitol street southwest? A. I accompanied Mr. Selecman last Thursday, the 28th day of March, to visit the several pieces of property

53 mentioned.

Q. Did you hear Mr. Selecman's testimony as to the valuation placed upon these several pieces of property, totaling $6,000.00? A. I did.

Q. State whether or not you would make the same replies to the several questions that I propounded to Mr. Selecman if severally repeated to you? A. I would.

Q. State whether or not you regard the sum of $6,000.00 as the fair market value of these several pieces of property? A. I do, and I believe they would bring $6,000.00.

RALPH L. HALL.

Subscribed and sworn to before me this 2nd day of April, A. D. 1907. EDWIN L. WILSON, *Examiner.*

Hereupon counsel for Margaret E. Taylor announced the testimony on her behalf closed.

Motion to Suppress, etc.

Filed May 7, 1907.

In the Supreme Court of the District of Columbia.

Equity. No. 26540.

MARY J. LEESNITZER, Complainant,

vs.

ELIZABETH E. PADGETT ET AL., Defendants.

Now comes the complainant, by her solicitor, and moves

54 the Court to suppress and strike out the depositions taken on behalf of the defendant, Margaret E. Taylor, before Edwin

Wilson, an Examiner in Chancery of this Court, on the 30th day of March, A. D. 1907, for the following reasons:

1. Because no sufficient notice of the time and place of the taking of the said depositions was given to the said complainant, or her solicitor.

2. Because under the pleadings, decree and proceedings in said cause it was not competent for the said defendant Margaret E. Taylor to take, and she was precluded from the taking, of the said depositions on her behalf in rebuttal of depositions taken on behalf of complainant, and duly filed in this cause, no answer having been filed on her behalf, or any issue of fact raised by her in the said cause.

In support of said motion the complainant files the affidavit annexed hereto.

EDMUND BURKE,
Solicitor for Complainant.

DISTRICT OF COLUMBIA, *To wit:*

Edmund Burke, on oath deposes and says that he is the solicitor of record for the complainant in the said cause, and her only solicitor; that on March 30th, 1907 he received from Edwin L. Wilson, Examiner in Chancery a postal card in the following words and figures, "March 29, 1907. Dear Mr. Burke,—Mr. McGill will take depositions in the Leesnitzer case to-morrow morning (Saturday) at 10 o'clock in my office. Please be present.—Yours truly,
55 Edwin L. Wilson, Fendall Building," which said postal card affiant files herewith as a part of this affidavit; that said postal card was received by affiant at about the hour of 10 o'clock A. M. on Saturday, the 30th day of March, 1907; that no notice was given to the complainant in said cause. That neither the complainant, nor said solicitor was present at the taking of the said depositions.

EDMUND BURKE.

Subscribed and sworn to before me this 7th day of May, A. D. 1907.

J. R. YOUNG, *Clk.*
By F. E. CUNNINGHAM, *Ass't Clk.*

To J. J. Darlington and J. Nota McGill, solicitors for def't Margaret Taylor.

GENTLEMEN: Please take notice that the foregoing motion will be presented to the Honorable Justice holding Equity Court No. 1 upon the hearing of the said cause for the action of the Court thereon.

EDMUND BURKE,
Solicitor for Complainant.

56 *Postal Card.*

Washington, D. C.
Rec'd
Mar 29
2 - P M
1907

EDMUND BURKE, Esq.,
The Imperial,
City.

MARCH 29, 1907.

DEAR MR. BURKE: Mr. McGill will take depositions in the Leesnitzer case tomorrow morning (Saturday) at 10 o'clock in my office.

Please be present,
Yours truly, EDWIN L. WILSON, *Fendall Bldg.*

Affidavit in Support of Motion to Suppress Deposition.

Filed May 23, 1907.

In the Supreme Court of the District of Columbia, Holding an Equity Court.

Equity. No. 26540.

MARY J. LEESNITZER
vs.
ELIZABETH E. PADGETT ET AL.

DISTRICT OF COLUMBIA, *ss:*

57 Personally appeared before me, a Notary Public in and for the District of Columbia, J. Nota McGill, who upon oath doth depose and say as follows:

That he is of counsel for Margaret E. Taylor, one of the defendants herein; that on Monday, March 25, 1907, deponent notified Edwin L. Wilson, Esquire, an Examiner in Chancery, that deponent desired to take testimony in behalf of the said Margaret E. Taylor on Saturday, March 30th, 1907, and requested the said Wilson to notify Edmund Burke, Esquire, solicitor for complainant; that such notice and request to the said Wilson were given over the telephone; that subsequently, to wit, on March 29th, 1907, affiant again communicated with the said Wilson by telephone, requesting that he again notify the said Burke; that the said Wilson replied that the said Burke was present in his, the said Wilson's, office at the time deponent first requested the said Wilson to so notify the said Burke, and that he, the said Wilson, had then and there notified the said Burke of the intention to take testimony in behalf of the said Margaret E. Taylor on March 30th, 1907, but that he

would nevertheless again notify the said Burke, as requested by deponent.

Deponent further states that on Saturday, March 30th, 1907, the said Wilson advised deponent that he had twice notified the said Burke that testimony would be taken, first orally and then by mail, but that he, the said Wilson, had reason to believe that the said Burke did not intend to be present.

58 This deponent further on oath sayeth that no notice or intimation of any application to strike from the files the testimony so taken on behalf of the defendant Margaret E. Taylor was given by the complainant or her solicitor until about four o'clock p. m. on the 7th day of May, 1907, after the cause had been calendared for hearing, the said cause having so come on for argument, final hearing and decree at ten o'clock a. m. on the following day, too late to permit the retaking of the testimony on behalf of the said defendant, upon other or further notice to the complainant or her solicitor as required under the rules of the court.

J. NOTA McGILL.

Subscribed and sworn to this ninth day of May, 1907.

[SEAL.] FRANCIS S. MAGUIRE,
Notary Public.

In the Supreme Court of the District of Columbia, Holding an Equity Court.

Equity. No. 26540.

MARY J. LEESNITZER
vs.
ELIZABETH E. PADGETT ET AL.

DISTRICT OF COLUMBIA, *ss:*

Personally appeared before me, a Notary Public in and for the District of Columbia, Edwin L. Wilson, who upon oath doth depose and say as follows:

59 That he is an Examiner in Chancery of this court; that on Monday, March 25th, or Tuesday, March 26th, 1907, deponent orally notified Edmund Burke, Esquire, solicitor for complainant, that testimony would be taken in behalf of the defendant, Margaret E. Taylor, before this deponent on March 30th, 1907; that on March 29th, 1907, deponent advised J. Nota McGill, Esquire, of counsel for said Margaret E. Taylor, that he, the deponent had notified the said Burke, as above stated, but at the request of the said McGill deponent on that date, to wit, March 29th, 1907, again notified the said Burke by mail that testimony would be taken, as aforesaid, on March 30th, 1907.

EDWIN L. WILSON.

Sworn to and subscribed before me this ninth day of May, 1907.

[SEAL.] FRANCIS S. MAGUIRE,
Notary Public.

Motion to Strike Out Testimony.

Filed May 24, 1907.

In the Supreme Court of the District of Columbia.

No. 26540. Equity.

MARY J. LEESNITZER
vs.
ELIZABETH E. PADGETT ET AL.

Now comes the defendant Margaret E. Taylor and moves the court to strike out all the testimony of the complainant, or in any event so much thereof as relates to the question of the value
60 of the real estate described in the bill, on the ground that no issue as to the said question of value was raised by the pleadings; that, in electing to stand upon her demurrer, the defendant neither intended nor understood herself to be concluded as to any matter of fact not raised by her said demurrer, nor to make any evidence competent or admissible in the case as to matters not put in issue by the pleadings, and on the further ground that, the defendant having elected to stand upon her demurrer, and all the parties to the cause being *sui juris*, no issues of fact remained or existed in the cause to render the taking of any testimony therein competent.

J. NOTA McGILL,
J. J. DARLINGTON,
Solicitors for Defendant Margaret E. Taylor.

Decree.

Filed May 28, 1907.

In the Supreme Court of the District of Columbia.

No. 26540. Equity.

MARY J. LEESNITZER
vs.
ELIZABETH E. PADGETT ET AL.

This cause coming on for final decree upon the pleadings, the testimony, the motion of the complainant to strike out the testimony of the defendant Margaret E. Taylor, and the motion of the
61 said defendant Taylor to strike out the testimony on behalf of the complainant, or so much thereof as relates to the question of the value of the real estate described in the bill, and the same having been argued by the solicitors for the parties, respect-

ively, and duly considered, it is thereupon by the court, this 28th day of May, A. D. 1907, adjudged, ordered and decreed as follows:

1. That the said motion of the complainant be, and the same hereby is, granted.

2. That the said motion of the said Margaret E. Taylor be, and the same hereby is, denied, except as to so much of the testimony of the complainant as relates to the value of the property, as to which said portion of her testimony the motion to strike out is granted.

3. That the real estate described in the bill, namely, Lot numbered Twenty-eight (28) in James H. Grant's subdivision of Original Lot numbered Six (6) and parts of Original Lots Seven (7) and eight (8), in Square numbered Six hundred and ninety-seven (697), as said subdivision is recorded in Book No. 13 at page 145 of the Records of the Surveyor's Office of the District of Columbia; Part of Lots lettered A, B and C in Walter Clark's subdivision of lots in square numbered Two hundred and sixty-four (264) as said subdivision is recorded in the office of the Surveyor of the District of Columbia in Book N. K. page 269, beginning for the same on the line of C Street South at a point twenty-five and sixty-seven hundredths (25 67/100) feet West from the South-east corner of said Square and running thence west with the line of C Street
62 Sixteen and thirty-one hundredths (16 31/100) feet, thence North forty-nine and fifty hundredths (49 50/100) feet, thence East Sixteen and thirty-one — (16 31/100) feet, thence South Forty-nine and fifty hundredths (49 50/100) feet to beginning, subject to right of way over the north one (1) foot six (6) inches of said described property to be used in connection with the one (1) foot six (6) inches from the South part of the lot adjoining said property on the North as a three (3) foot alley or passage way; and the South one-half (½) of Original Lot numbered Five (5) in Square numbered Four Hundred and eleven (411), all in the City of Washington, in the District of Columbia, be sold for the purpose of partition or division between the complainant Mary J. Leesnitzer and the defendant Elizabeth E. Padgett as prayed in the bill, free and clear of any right of dower in the said real estate, or any of it, in the defendant Margaret E. Taylor, whose dower right in and to each and every of the above described parcels of real estate is hereby further adjudged and decreed to be barred, as prayed in the bill.

4. That Edmund Burke and Lawrence Hufty be, and they hereby are, appointed trustees to make sale of the said described real estate as above provided, and in accordance with Rule 91 of this court, upon first giving bond to the United States of America in the penal sum of Seventy-five hundred dollars, with one or more sureties approved by the court, or one of the justices thereof, for the faithful performance of their duties as such trustees.

5. That, unless the defendant Margaret E. Taylor shall
63 perfect her appeal from this decree, which is prayed by her in open court and allowed, by giving a supersedeas bond in

the penal sum of One Thousand dollars, in accordance with and within the time allowed therefor by the rules of the court, the said trustees be, and they hereby are, further authorized to receive and collect the rents and income from the said real estate pending the final termination of this cause, and to hold the same subject to the further order of this court.

6. That the complainant recover the costs of this cause against the defendant Margaret E. Taylor, and have execution therefor as at law.

HARRY M. CLABAUGH,
Chief Justice.

Memorandum.

June 3, 1907.—Appeal bond filed.

64 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, *District of Columbia, ss:*

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, do hereby certify the foregoing pages, numbered from 1 to 63, both inclusive, to be a true and correct transcript of the record, as prescribed by Rule Five (5) of the Court of Appeals of the District of Columbia, in cause No. 26540, Equity, wherein Mary J. Leesnitzer, is Complainant, and Elizabeth E. Padgett, *et al.*, are Defendants, as the same remains upon the files and of record in said Court.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of said Court, at the city of Washington, in said District, this 16th day of July, A. D., 1907.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia supreme court. No. 1808. Margaret E. Taylor, &c., appellant, *vs.* Mary J. Leesnitzer. Court of Appeals, District of Columbia. Filed Jul- 17, 1907. Henry W. Hodges, clerk.

In the Court of Appeals of the District of Columbia.

No. 1808.

MARGARET E. TAYLOR, Appellant,
vs.
MARY J. LEESNITZER.

Now comes the said Mary J. Leesnitzer by her solicitor of record and moves the Court to dismiss the appeal in this cause for the following reasons:

1. Because Elizabeth E. Padgett, one of the defendants to the original bill, and having a substantial interest adverse to the appellant in the counts of the decree appealed from in this cause, and who will be affected by its modification or reversal, has not been sued either as an appellee or appellant in this appeal, or has a party hereto.

2. That there has been no summons and service, or service or notification of appeal upon said Elizabeth E. Padgett.

EDMUND BURKE,
Solicitor for Elizabeth E. Padgett.

To J. J. Darlington and J. Nota McGill:

Take notice that the aforegoing motion will be presented to the Court of Appeals of the District upon the call of the cause for argument for action of the Court.

EDMUND BURKE,
Solicitor for Elizabeth E. Padgett.

Service acknowledged this 12th day of February A. D. 1908.
J. J. DARLINGTON.

(Endorsed:) No. 1808. Margaret E. Taylor Appellant vs. Mary J. Leesnitzer. Motion to dismiss appeal. Court of Appeals, District of Columbia. Filed Feb. 12, 1908. Henry W. Hodges, Clerk.

THURSDAY, *February 13th, A. D.* 1908.

No. 1808.

MARGARET E. TAYLOR, in Her Own Right and as Executrix of Thomas Taylor, Deceased, Appellant,
vs.
MARY J. LEESNITZER, ELIZABETH E. PADGETT, and FRANKLIN C. PADGETT.

The motion to dismiss the appeal in the above entitled cause was submitted to the consideration of the Court by Mr. Edmund Burke, attorney for the appellee, Leesnitzer, in support of motion.

The argument in the above entitled cause was commenced by Mr.

J. Nota McGill, attorney for the appellant, and was continued by Mr. Edmund Burke, attorney for the appellee, Leesnitzer, and was concluded by Mr. J. J. Darlington, attorney for the appellant.

No. 1808.

MARGARET E. TAYLOR, in Her Own Right and as Executrix of Thomas Taylor, Deceased, Appellant,
v.
MARY J. LEESNITZER.

Opinion.

Mr. Justice ROBB delivered the opinion of the Court:

This is an appeal from a decree passed upon a bill filed by appellee, Mary J. Leesnitzer, against Margaret E. Taylor in her own right and as executrix of her deceased husband, Elizabeth E. Padgett and Franklin C. Padgett, her husband, averring that the testator acquired the real estate described in the bill subsequently to the execution of his will, and that at his death said real estate vested in his heirs, said Mary J. Leesnitzer and said Elizabeth E. Padgett, his half sisters; that appellant had not renounced under the will within the time fixed by law and that she had thereby become barred of dower right in said real estate; whereupon the bill prayed that said real estate might be sold and the proceeds divided between said heirs.

Appellant interposed a demurrer to said bill, which being overruled and appellant electing to stand thereon, the court decreed said real estate to be sold and the proceeds divided between said heirs without dower to appellant.

A motion has been made to dismiss the appeal because "Elizabeth E. Padgett, one of the defendants to the original bill, and having a substantial interest adverse to appellant in the maintenance of the decree appealed from in this cause, and who will be affected by its modification or reversal, has not been joined either as an appellee or appellant or as a party hereto," and "that there has been no summons and severance, or service of notification of appeal upon said Elizabeth E. Padgett."

Mrs. Padgett and her sister have a joint interest in the subject-matter of the decree appealed from, but Mrs. Padgett was not made a party to the appeal. These facts bring this case within the rule: Godfrey v. Roessle, 5 App. D. C., 299; Slater v. Hamacher, 15 App. D. C., 294; Masterson v. Herndon, 10 Wall., 416; Cruitt v. Owen, 21 App. D. C., 391.

We are constrained to dismiss the appeal with costs, and it is so ordered.

Appeal dismissed.

TUESDAY, *March 31st, A. D.* 1908.

January Term, 1908.

No. 1808.

MARGARET E. TAYLOR, in Her Own Right and as Executrix of Thomas Taylor, Deceased, Appellant,
vs.
MARY J. LEESNITZER, ELIZABETH E. PADGETT, and FRANKLIN C. PADGETT.

Appeal from the Supreme Court of the District of Columbia.

This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia, and was argued by counsel. On consideration whereof, It is now here ordered, adjudged and decreed by this Court that this appeal be, and the same is hereby, dismissed with costs.

Per MR. JUSTICE ROBB,
March 31, 1908.

In the Court of Appeals of the District of Columbia, January Term, 1908.

No. 1808.

MARGARET E. TAYLOR, Appellant,
vs.
MARY J. LEESNITZER et al., Appellees.

Motion to Modify Decree, with Leave to Amend and Correct Appeal.

Now comes Margaret E. Taylor, appellant in the above entitled cause, and moves the court that its decree rendered therein, to wit, on the 31st day of March, A. D. 1908, dismissing her appeal, may be modified by allowing her leave to amend and correct her appeal by citing in the omitted parties, Elizabeth E. Padgett and Franklin C. Padgett, her husband, by citation from this court, in accordance with the oral application to that end made by her counsel at the argument in the event that the court should find they were necessary parties, and for such further proceedings as may be necessary to a decision of the cause upon its merits; and, for grounds of her said motion, she shows to the court as follows:

1. That, as shown by the records of this court, the transcript of the record from the court below was filed in the office of the Clerk of this Court on the 17th day of July, 1907, printed copies of the record as required by the rules of this court were filed therein on the 5th day of August, 1907, while the motion of the appellee Mary J. Leesnitzer to dismiss the appeal for failure to summons and sever was not filed until the 12th day of February, 1908, after the cause

was already on the assignment and within less than twenty-four hours before it was actually reached on the call and argued, without notice to the appellant or counsel in sufficient time to admit of earlier or more formal application for leave to amend and correct her appeal.

2. That the leave prayed is in accordance with the prior practice of this court. Slater vs. Hamacher, 15 D. C. App., 294, 299, 568.

3. That the form of the decree below, granting to the appellant, in open court, a separate appeal therefrom, was such as to create in the minds of her counsel reasonable belief that the decree was, itself, a severance, and that, being taken in open court, no citation was necessary. (Leonard vs. Rodda, 5 D. C. App., p. 262-3, and citations; Shepard vs. Pepper, 133 U. S., 644-45); and that the appellant, therefore, is entitled to a favorable exercise of the discretion of the court in the premises.

J. J. DARLINGTON,
J. NOTA McGILL,
Solicitors for Appellant.

In the Court of Appeals of the District of Columbia, January Term, 1908.

No. 1808.

MARGARET E. TAYLOR, Appellant,
vs.
MARY J. LEESNITZER et al., Appellees.

DISTRICT OF COLUMBIA, *ss:*

I, Walter W. White, on oath say that I served on Edmund Burke, Esq., Solicitor for Appellee, in person, on Tuesday the 31st day of March, A. D. 1908, a copy of the motion filed on that day in the above entitled cause to modify the decree of dismissal and for leave to amend and correct appeal.

WALTER W. WHITE.

Subscribed and sworn to before me this 1st day of April, A. D. 1908.

IRWIN H. LINTON,
Notary Public, D. C.

[NOTARIAL SEAL.]

(Endorsed:) January Term, 1908. No. 1808. In the Court of Appeals. Margaret E. Taylor, Appellant, vs. Mary J. Leesnitzer et al., Appellees. Affidavit of Service *in re* Motion to Modify Decree with Leave to Amend and Correct Appeal. Court of Appeals, District of Columbia. Filed April 1, 1908. Henry W. Hodges, Clerk.

In the Court of Appeals of the District of Columbia, January Term, 1908.

No. 1808.

MARGARET E. TAYLOR, Appellant,
vs.
MARY J. LEESNITZER.

Now comes Mary J. Leesnitzer and for answer to the appellant's motion for leave to amend and correct the appeal in this cause says that said motion should be denied for the following reasons.

1. Because there is no such cause pending in this Court as that stated in the caption of the appellant's motion in which Mary J. Leesnitzer, "et al." are appellees, this court having already in its decree dismissing the appeal decided that the other parties to the original suit were not before this Court as appellees on the said appeal, which fact is also shown by the transcript of the record as originally printed and filed herein.

2. Because the appellant's claim of surprise by appellee's motion to dismiss is refuted by an inspection of record, which shows that in the original printed covers of the transcript, the case was truly styled

"MARGARET E. TAYLOR in Her Own Right and as Executrix of
"Thomas Taylor, Deceased, Appellant,
vs.
"MARY J. LEESNITZER."

and that subsequently and long before the hearing of the case on argument, the appellant caused said covers to be stripped off the printed record, and substituted in lieu thereof printed covers erroneously styling the cause,

"MARGARET E. TAYLOR in Her Own Right and as Executrix of
Thomas Taylor, Deceased, Appellant,
vs.
"MARY J. LEESNITZER, ELIZABETH E. PADGETT, and FRANKLIN C.
"PADGETT,

all of the said records purporting to have been filed on the same day, viz, July 17, 1907, and that such substitution shows on its face that the appellant and her counsel were not taken by surprise, but were conscious that said appeal had been taken erroneously, and were guilty of laches after knowledge of such fact in failing to take any steps to correct the appeal prior to the final decision of the court thereon.

3. That counsel for appellee was misled by the style of the cause appearing on the said substituted covers, and only discovered that the proper parties were omitted when the printing of his brief was nearly finished, and immediately on the same day that it was filed gave notice of the motion to dismiss the appeal.

4. Because the appellant's counsel had ample opportunity to move the court for a postponement of the hearing, argument and judgment of the court, to afford opportunity to them for any action directed to the amending and correction of said appeal before the cause was heard, argued or decided.

5. Because the appellant's motion shows that her counsel put this Court on terms "in the event that the Court should find they (omitted parties) were necessary parties" the Court should then allow appellant leave to correct the appeal by citing said omitted parties by citation from this Court, and to take such further proceedings as might be necessary to a decision of the cause upon its merits.

6. The granting of an appeal to the appellant in the lower Court did not dispense with proceedings necessary and requisite in the lower Court to dissociate the appellant so as to enable her to appeal alone and if the mere fact that one of several defendants notes an appeal in the lower Court is equivalent to a summons and severance, then the established rule upon that subject will in effect be abolished.

In Inglehart vs. Stansbury, 151 U. S. 68 the principal matter in controversy was the validity of proceedings in a partition suit and an appeal was taken by the heirs of the deceased trustee. A motion was made to dismiss the appeal by appellee's counsel, Mr. J. J. Darlington, on the ground "that the appellants were joint parties in the suit with other persons who had beneficial and substantial interests therein; and said other persons have not been made parties to the appeal, and there has been no summons to them and severance, or any other equivalent action." The motion to dismiss was opposed upon the ground that the heirs of the trustee represented the omitted parties. But the court decided that they "could not appeal alone without joining the other defendants as appellants or showing a valid excuse for not joining them. This could only be shown by a summons and severance or by some equivalent proceeding, such as a request to the other defendants and their refusal to join in the appeal, or at least notice to them to appear and their failure to do so; *and this must be evident upon the record of the Court appealed from* in order to enable the party prevailing in that court to enforce his decree against those who do not wish to have it reversed, and to prevent him and the appellate Court from being vexed by successive appeals in the same matter. Citing: Owings vs. Kincannon 32 U. S. (7 Peters) 399, Todd vs. Daniel, 41 U. S. (16 Peters) 521, 523, Masterson vs. Howard 77 U. S. (10 Wall.) 416, Hardee vs. Wilson (146 U. S.) 179."

8. The motion of the appellant if granted would be a reversal of the judgment of the Court already rendered in order to make room for the exercise of a discretion favorable to the appellant and thereby overrule the appellee's motion to dismiss. The Court having already adjudged the merits of the motion to dismiss, such decision necessarily denied the exercise of any discretion in favor of the appellant as to the allowance of any amendment of the said appeal.

EDMUND BURKE,
Counsel for Mary J. Leesnitzer, Appellee.

(Endorsed:) In the Court of Appeals. No. 1808. Margaret E. Taylor Appellant, vs. Mary J. Leesnitzer, Appellee. Answer of Appellee. Court of Appeals, District of Columbia. Filed Apr. 18, 1908. Henry W. Hodges, Clerk.

No. 1808.

MARGARET E. TAYLOR
v.
MARY J. LEESNITZER.

Opinion.

Mr. Chief Justice SHEPARD delivered the opinion of the Court:

The appellant has filed a motion to set aside the decree dismissing her appeal, and for a hearing on the merits, or else modifying the same so that she be permitted to correct her record by citing the omitted parties, or giving an additional bond.

This is not a case of a judgment or decree against two or more defendants whose interests are inseparably involved, in which case to authorize an appeal by one alone there must be a summons and severance. The interests of complainant and the defendant Padgett were the same, and the latter was made a party defendant for the purpose of obtaining partition of the lands claimed by her and complainant as tenants in common. Her interests were antagonistic to those of the chief defendant, and identical with those of the complainant. She was a necessary party to the suit and, so far as defendant Taylor was concerned in the subject-matter of the controversy, occupied the attitude of the complainant. In equity, parties, one in interest, may be arrayed as plaintiffs and defendants, nominally, but their true relations are taken into consideration throughout the entire proceeding. Having admitted the allegations of the bill and thereby arrayed herself in interest with the plaintiff and against the other defendant, the decree gave her all that she could expect. She had nothing that she could appeal from and it was not necessary that defendant Taylor should obtain a severance from her in order to prosecute an appeal. That appeal, to be effective, must be against her as well as against the complainant. The decree running in favor of both, and being inseparable, it is not perceived how it could be reversed as to the one and not as to the other, or how the question involved could be adjudicated in the case of one without seriously affecting the interests of the other. The reason, therefore, for requiring both to be made parties to one appeal, is even stronger than that which requires two defendants affected alike by a decree to join in an appeal, or else sever in case one be content to abide by the result. If the notice of appeal given in open court was intended to include Mrs. Padgett also, it was as effectual against her as against the complainant. But if intended to be included, the required supersedeas bond was as important to her as to complainant, and intended equally for the protection of her interests. This bond is not copied in the transcript, as the rules do not permit it under ordinary con-

ditions. The simple recital is: "June 2, 1907, appeal bond filed." An inspection of the original bond in the office of the clerk of the court below shows that it was conditioned solely for the benefit of the complainant Leesnitzer; the defendant Padgett is not mentioned in it.

It is contended that this court has no right to look beyond the transcript as filed, and that the presumption must be indulged that the bond is complete in all respects. Martin v. Hunter, 1 Wheat., 304, 361, is cited in support of this contention. Without pausing to consider the difference between the statute regulating writs of error from the Supreme Court of the United States, which was under consideration in that case, and the rule providing for appeals to this court, the proposition may be conceded as sound under ordinary conditions. But, under the conditions of this case, the presumption as regards the recitals of the bond operates rather against than in favor of the appellant. When the transcript in this case was filed, July 17, 1907, it was entitled Margaret E. Taylor, etc., v. Mary J. Leesnitzer, and was so entered upon the docket. The usual appearance signed by counsel for appellee was executed under that title. The record was printed as filed, and in September a copy was delivered to counsel for Mrs. Leesnitzer, who also entered his appearance for her. A few days before the case was called for hearing counsel for the appellant informed the clerk that the case had not been properly docketed, as Mrs. Leesnitzer was not the only appellee, and requested that the docket and cover of the records be corrected, making the title appear as follows: "Margaret E. Taylor, etc., v. Mary J. Leesnitzer, Elizabeth E. Padgett, and Franklin C. Padgett." This was done and the cover of the printed record was changed and reprinted as requested. No application was made to the court for leave to do this. The caption of the transcript as it came from the court below remains unaltered. Another copy, with the amended title on the cover, was then delivered to counsel for Leesnitzer. The motion to dismiss was made within twenty days thereafter. The title given by the clerk below to the transcript was the correct one if the bond ran only in favor of Mrs. Leesnitzer, and the presumption is that he followed the obligation of the bond. The ex parte amendment of the docket entry and the title on the cover of the printed record can not have the effect to raise the counter presumption contended for. The appeal was, therefore, correctly dismissed.

The suggestion made on the argument of the case that in the event the motion be held to be well taken the appellant may be allowed to file an additional supersedeas bond and have a citation to Mrs. Padgett and her husband, has been renewed in the present motion.

While we regret to have to dispose of an appeal save upon its merits, we do not perceive how this motion can be granted. Under the provisions of the Revised Statutes (sections 1000, 1005, 1007, and perhaps others) the Supreme Court of the United States has been quite liberal in indulging presumptions in favor of regularity, and in permitting amendments to writs of error and citations therein. See Martin v. Hunter, 1 Wheat., 304, 361; Peugh v. Davis, 110

U. S., 227; Inland etc. Coasting Co. v. Tolson, 136 U. S., 572, and other cases referred to therein. In Scruggs v. M. C. R. R. Co., 136 U. S. (Appendix), CCIV, an appeal bond for costs though not signed by all of the appel-ants, was held to be sufficient surety. In Shepherd v. Pepper, 133 U. S., 627, 644, five defendants gave notice of appeal in open court. A supersedeas bond was required of one of them, Gray, in the sum of $100, which she had neglected to execute. She was in the appellate court on the record, no citation being necessary because of the notice and allowance of appeal having been made in open court, and the court permitted her to execute the bond nunc pro tunc. This had no effect to bring in a new party but amended a defective appeal and perfected it. On the other hand, the same court has, of its own motion, dismissed appeals where a necessary party has not been brought up by the writ of error or the appeal. Estis v. Trabue, 128 U. S., 225, 229. It was held in that case that a writ of error might be amended under section 1005 R. S., so as to insert the names of the individual members of a partnership, in the place of the partnership, said names appearing elsewhere in the record. There was, however, another and fatal objection, as stated by Mr. Justice Blatchford in the following words: "But there is another difficulty in the present case, which can not be reached by an amendment in or by this court under section 1005. The judgment is distinctly one against the 'claimants' and C. F. Robinson and John W. Dillard, their sureties in the forthcoming bond, jointly, for a definite sum of money. There is nothing distributive in the judgment, so that it can be regarded as containing a separate judgment against the claimants and another separate judgment against the sureties, or as containing a judgment against the sureties payable and enforceable only on a failure to recover the amount from the claimants; and execution is awarded against all the parties jointly. In such a case the sureties have the right to a writ of error. Ex parte Sawyer 21 Wall., 235, 240. It is well settled that all the parties against whom a judgment of this kind is entered must join in a writ of error, if any one of them takes out such writ; or else there must be a proper summons and severance, in order to allow of the prosecution of the writ by any less than the whole number of the defendants against whom the judgment is rendered. * * * Where there is a substantial defect in a writ of error, which this court can not amend, it has no jurisdiction to try the case." In Mason v. U. S., 136 U. S., 581, certain sureties sued out a writ of error without joining the principal, and other sureties against whom judgment had gone by default. The court refused leave to amend the writ of error by adding the names of the omitted parties, or for a severance from them, and dismissed the writ of error. No motion to dismiss had been made, and the court discovered the defect on the argument.

As before said, the reasons for requiring all of the opposing parties in interest to be joined in the writ of error or appeal, are stronger than those which apply to the joinder of all those who have an interest identical with the plaintiff in error or appellant. In the latter case, one who has acquiesced in the judgment below is by the summons and severance barred of a writ of error thereafter. Where

the opposing interests are joint or inseparable, there is no question of severance; all whose interests are affected in common must be included in the writ of error or appeal. No writ of error issues from this court save to the Police Court in certain cases; all cases are brought up by appeal. Rule X of this court provides that no judgment or decree shall be reviewed unless appeal shall be taken within twenty days, Sundays excluded, after the same shall have been made or pronounced. And the appellant, to supersede the execution of the judgment or decree appealed from, shall within such time of twenty days file a bond conditioned for the successful prosecution of the appeal. The penalty of the bond in this case was fixed at $1,000 With the passage of the time given by the rule the right of appeal expires. Mulvihill v. Clabaugh, 21 App. D. C., 440, 443.

In Slater v. Hamacher, 15 App. D. C., 294, this court went very far in permitting an amendment citing in certain omitted parties, who should have been joined with the appellant, or else omitted by proper summons and severance. The decree had gone against these other defendants whose interests had been derived from the chief defendant, who alone appealed. They had acquiesced in the decree and were completely bound thereby, and the amendment cured what was considered, as shown by the authorities cited, a formal defect in the proceeding on appeal. Under the rules of the court those parties could not have taken an appeal from the decree after the time therefor had expired, and the notice given to them was a formality. In the present case, on the other hand, the omitted party was opposed in interest to the appellant, and was the beneficiary, jointly with the appellee, of the decree sought to be reviewed. The decree being in her favor she was interested in its maintenance and opposed to its review. To a proceeding to review it, she was a necessary party. As such she had the right to demand that, as to her also, the requirement of the rule should be obeyed. To permit her now to be brought in and made a party to the appeal would be to set aside the rule which is the law of the court as well as of the parties. "Under former decisions this court has no power to set aside its rules relating to appeals, and to permit a bond to be filed in this court in lieu of one that should have been filed in the court below as prescribed in those rules. U. S. ex rel. Mulvihill v. Clabaugh, 21 App. D. C., 440, and cases cited." Darlington v. Turner, 24 App. D. C., 573, 592. The situation as said in Estis v. Trabue, supra, is one that can not be reached by amendment. It follows that the motion and leave to amend must be denied.

Denied.

Court of Appeals of the District of Columbia, April Term, 1908.

No. 1808.

MARGARET E. TAYLOR, in Her Own Right and as Executrix of Thomas Taylor, Deceased, Appellant,
vs.
MARY J. LEESNITZER, ELIZABETH E. PADGETT, and FRANKLIN C. PADGETT.

On consideration of the motion to modify the decree with leave to amend and correct the appeal, in the above entitled cause, it is by the Court this day ordered that said motion be, and the same is hereby, denied.

Per MR. CHIEF JUSTICE SHEPARD,
June 9, 1908

[Endorsed:] No. 1808. Court of Appeals of the District of Columbia. Order denying motion to modify decree with leave to amend and correct appeal. Court of Appeals, District of Columbia. Filed Jun- 9, 1908. Henry W. Hodges, Clerk.

In the Court of Appeals of the District of Columbia, April Term, 1908.

No. 1808.

MARGARET E. TAYLOR, Appellant,
vs.
MARY J. LEESNITZER et al., Appellees.

And now comes Margaret E. Taylor, by her attorneys, and moves for the allowance of an appeal to the Supreme Court of the United States from the final decree entered against her in this Court; and she prays that the Court allow her to give bond, to act as a supersedeas, and that the court fix the amount thereof.

J. NOTA McGILL,
J. J. DARLINGTON,
Attorneys for Margaret E. Taylor.

In the Court of Appeals of the District of Columbia, January Term, 1908.

No. 1808.

MARGARET E. TAYLOR, Appellant,
vs.
MARY J. LEESNITZER et al., Appellees.

DISTRICT OF COLUMBIA, *ss:*

Personally appeared before me, a notary public, Floyd E. Davis, who upon oath doth depose and say that he is now and has been for

the past sixteen years engaged in the real estate business in the District of Columbia; that it is a part of his business to appraise or estimate the value of improved and unimproved real estate in the District of Columbia; that he is thoroughly familiar with the value of the various pieces of property involved in this litigation; and that the matter in dispute, exclusive of costs, exceeds the sum of Five Thousand Dollars.

FLOYD E. DAVIS.

Subscribed and sworn to before me this 13th day of June, 1908.
[NOTARIAL SEAL.] EVA J. DOLAN,
Notary Public D. of C.

In the Court of Appeals of the District of Columbia, January Term, 1908.

No. 1808.

MARGARET E. TAYLOR, Appellant,
vs.
MARY J. LEESNITZER et al., Appellees.

DISTRICT OF COLUMBIA, *ss:*

Personally appeared before me, a notary public, James F. Shea, who upon oath doth depose and say that he is now and has been for the past fifteen years engaged in the real estate business in the District of Columbia; that it is a part of his business to appraise or estimate the value of improved and unimproved real estate in the District of Columbia; that he is thoroughly familiar with the value of the various pieces of property involved in this litigation; and that the matter in dispute, exclusive of costs, exceeds the sum of Five Thousand Dollars.

JAMES F. SHEA.

Subscribed and sworn to before me this 15th day of June, 1908.
[NOTARIAL SEAL.] G. PERCY McGLUE,
Notary Public.

(Endorsed:) No. 1808. Margaret E. Taylor, Appellant, vs. Mary J. Leesnitzer et al. Appeal to Supreme Court U. S. and affidavits in support thereof. Court of Appeals, District of Columbia. Filed Jun- 15, 1908. Henry W. Hodges, Clerk.

TUESDAY, *June 16th, A. D.* 1908.

No. 1808.

MARGARET E. TAYLOR, in Her Own Right and as Executrix of Thomas Taylor, Deceased, Appellant,
vs.
MARY J. LEESNITZER, ELIZABETH E. PADGETT, and FRANKLIN C. PADGETT.

On motion of Mr. J. Nota McGill, of counsel for the appellant in the above entitled cause, it is ordered by the Court that said ap-

pellant be allowed an appeal to the Supreme Court of the United States, and the bond to act as supersedeas is fixed at the sum of eight thousand dollars.

(*Bond on Appeal.*)

Know all Men by these Presents, That we, Margaret E. Taylor, as principal, and Fidelity and Deposit Company of Maryland, a corporation of Maryland, as surety, are held and firmly bound unto Mary J. Leesnitzer, Elizabeth E. Padgett and Franklin C. Padgett, her husband, in the full and just sum of Eight Thousand dollars, to be paid to the said Mary J. Leesnitzer, Elizabeth E. Padgett and Franklin C. Padgett, their and each of their certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 16th day of June, in the year of our Lord one thousand nine hundred and eight.

Whereas, lately at a Court of Appeals of the District of Columbia in a suit depending in said Court, between Margaret E. Taylor and Mary J. Leesnitzer (on appeal of said Margaret E. Taylor from a final decree of the Supreme Court of the District of Columbia in a suit of Mary J. Leesnitzer against Elizabeth E. Padgett and Franklin C. Padgett, her husband, and Margaret E. Taylor) a decree was rendered against the said Margaret E. Taylor and the said Margaret E. Taylor having prayed and obtained an appeal to the Supreme Court of the United States to reverse the decree in the aforesaid suit, and a citation directed to the said Mary J. Leesnitzer, Elizabeth E. Padgett and Franklin C. Padgett citing and admonishing them to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date thereof:

Now, the condition of the above obligation is such, That if the said Margaret E. Taylor shall prosecute said appeal to effect, and answer all damages and costs if she fail to make her plea good, then the above obligation to be void; else to remain in full force and virtue.

MARGARET E. TAYLOR. [SEAL.]
FIDELITY AND DEPOSIT COMPANY
OF MARYLAND. [SEAL.]
By W. H. RONSAVILLE, [SEAL.]
Attorney-in-fact.

[Seal of Fidelity and Deposit Company of Maryland.]

Sealed and delivered in presence of—
FRANCIS S. MAGUIRE.

Approved by—
SETH SHEPARD,
Chief Justice of the Court of Appeals
of the District of Columbia.

[Endorsed:] No. 1808. Margaret E. Taylor, &c., Appellant, vs. Mary J. Leesnitzer, Elizabeth E. Padgett and Franklin C. Padgett. Bond on Appeal to Supreme Court, U. S. Court of Appeals, District of Columbia. Filed Jun- 17, 1908. Henry W. Hodges, Clerk.

WASHINGTON, *16th June*, 1908.

To the Clerk of the Court of Appeals of the District of Columbia.

SIR: In the matter of the appeal to the Supreme Court of the United States in case No. 1808, Margaret E. Taylor, Appellant, versus Mary J. Leesnitzer, please issue citation against Mary J. Leesnitzer, Elizabeth E. Padgett, and Franklin C. Padgett.

Very respectfully,

J. NOTA McGILL,
J. J. DARLINGTON,
Attorneys for Margaret E. Taylor.

(Endorsed:) No. 1808. Margaret E. Taylor &c. Appellant, vs. Mary J. Leesnitzer et al. Appellant's request for issue of citation. Court of Appeals, District of Columbia. Filed Jun- 17, 1908. Henry W. Hodges, Clerk.

25551.

UNITED STATES OF AMERICA, *ss:*

To Mary J. Leesnitzer, Elizabeth E. Padgett, and Franklin C. Padgett, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to an order allowing an appeal, filed in the Clerk's Office of the Court of Appeals of the District of Columbia, wherein Margaret E. Taylor, in her own right and as Executrix of Thomas Taylor, deceased, is appellant and you are appellees, to show cause, if any there be, why the decree rendered against the appellant, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Seth Shepard, Chief Justice of the Court of Appeals of the District of Columbia, this 17th day of June, in the year of our Lord one thousand nine hundred and eight.

SETH SHEPARD,
Chief Justice of the Court of Appeals of the District of Columbia.

[Endorsed:] Delivered a true copy of the within citation to the within named appellee Mary J. Leesnitzer on this 18th day of June 1908. Aulick Palmer, U. S. Marshal for District of Columbia. Court of Appeals, District of Columbia. Filed Jul- 13, 1908. Henry W. Hodges, Clerk.

UNITED STATES OF AMERICA, *ss:*

To Mary J. Leesnitzer, Elizabeth E. Padgett, and Franklin C. Padgett, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to an order allowing an appeal, filed

in the Clerk's Office of the Court of Appeals of the District of Columbia, wherein Margaret E. Taylor in her own right and as Executrix of Thomas Taylor, deceased, is appellant and you are appellees, to show cause, if any there be, why the decree rendered against the appellant, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Seth Shepard, Chief Justice of the Court of Appeals of the District of Columbia, this 17th day of June, in the year of our Lord one thousand nine hundred and eight.

SETH SHEPARD,
Chief Justice of the Court of Appeals of the District of Columbia.

On this Thirtieth day of June, in the year of our Lord one thousand nine hundred and eight, personally appeared Frank P. Hurd Sheriff before me, the subscriber, and made oath that he has & did serve a copy of this paper on Elizabeth E. Padgett & Franklin C. Padgett and makes oath that he delivered a true copy of the within citation to Elizabeth E. Padgett & Franklin C. Padgett on this date June 30th 1908.

Sworn to and subscribed the 30th day of June A. D. 1908.

COLUMBUS PUMPHREY, *J. P.*

STATE OF MARYLAND,
Prince George's County, sct:

I, Benjamin D. Stephen, Clerk of the Circuit Court of Prince George's County, do hereby certify, That Columbus Pumphrey, Esquire, before whom the annexed affidavit was made, and who thereunto subscribed his name was at the time of so doing a Justice of the Peace of the State of Maryland, in and for Prince George's County, duly commissioned and sworn and authorized by law to administer oaths and take acknowledgments or proofs of Deeds to be recorded therein. I further certify that I am acquainted with the handwriting of the said Justice and verily believe the signature to be his genuine signature.

In Testimony Whereof, I hereunto set my hand and affix the Seal of the Circuit Court for Prince George's County, the same being a Court of Record, this 10th day of July A. D., 1908.

[Seal Circuit Court of Prince George's County, Maryland.]

BENJ. D. STEPHEN,
Clerk of the Circuit Court for Prince George's County.

[Endorsed:] Court of Appeals, District of Columbia. Filed Jul-15, 1908. Henry W. Hodges, Clerk.

Court of Appeals of the District of Columbia.

I, Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages numbered from 1 to 58, inclusive, contain a true copy of the transcript of record and proceedings of said Court of Appeals in the case of Margaret E. Taylor, in her Own Right and as Executrix of Thomas Taylor, deceased, Appellant, vs. Mary J. Leesnitzer, Elizabeth E. Padgett and Franklin C. Padgett, No. 1808, April Term, 1908, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the City of Washington, this 22d day of July, A. D. 1908.

[Seal Court of Appeals, District of Columbia.]

HENRY W. HODGES,
Clerk of the Court of Appeals
of the District of Columbia.

Endorsed on cover: File No. 21,285. District of Columbia Court of Appeals. Term No. 221. Margaret E. Taylor, in her own right and as executrix of Thomas Taylor, deceased, appellant, vs. Mary J. Leesnitzer, Elizabeth E. Padgett, and Franklin C. Padgett. Filed August 4, 1908. File No. 21,285.

Supreme Court of the United States, October Term, 1909.

No. 221.

MARGARET E. TAYLOR, &c., Appellant,

vs.

MARY J. LEESNITZER et al.

It is stipulated and agreed by and between the appellant and appellee, by their respective solicitor, that the motion and notice thereof to dismiss the appeal in this cause in the Court of Appeals of the District of Columbia are erroneously printed at page 35 of the record of the said cause on appeal in this Court, and that in lieu thereof the following should be inserted in the record in this Court as a true copy of the original.

"In the Court of Appeals of the District of Columbia.

No. 1808.

MARGARET E. TAYLOR, Appellant,

vs.

MARY J. LEESNITZER.

Now comes the said Mary J. Leesnitzer by her solicitor of record and moves the Court to dismiss the appeal in this cause for the following reasons:

1. Because Elizabeth E. Padgett, one of the defendants to the original bill, and having a substantial interest adverse to appellant in the maintenance of the decree appealed from in this cause, and who will be affected by its modification or reversal, has not been joined either as an appellee or appellant or as a party hereto.

2. That there has been no summons and severance, or service of notification of appeal upon said Elizabeth E. Padgett.

EDMUND BURKE,
Solicitor for Appellee."

To J. J. Darlington and J. Nota McGill:

Take notice that the foregoing motion will be presented to the Court of Appeals of the District upon the call of the cause for argument for action of the Court.

EDMUND BURKE,
Solicitor for Appellee.

Service acknowledged this 12th day of February, A. D. 1908.

J. J. DARLINGTON.

J. J. DARLINGTON,
J. NOTA McGILL,
Solicitors for Appellant.
EDMUND BURKE,
Solicitor for Mary J. Leesnitzer, Appellee.

[Endorsed:] File No. 21,285. Supreme Court U. S., October Term, 1910. Term No. 45. Margaret E. Taylor, in her own right, etc., Appellant, vs. Mary J. Leesnitzer et al. Stipulation of counsel and addition to record. Filed November 5, 1910.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1910.

No. 45.

MARGARET E. TAYLOR, APPELLANT,

vs.

MARY J. LEESNITZER, ET AL., APPELLEES.

ADDITION TO BRIEF FOR APPELLEES.

EDMUND BURKE,
Solicitor for Appellees.

J. D. MILANS & SONS, LAW PRINTERS, 515 E STREET, N. W., WASHINGTON, D.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1910.

No. 45.

MARGARET E. TAYLOR, APPELLANT,

vs.

MARY J. LEESNITZER, ET AL., APPELLEES.

ADDITION TO BRIEF FOR APPELLEES.

I.

That the first assignment of error by the appellant is not well taken, at page 7 of the brief, it is only necessary to refer this Court to the opinion of the Court of Appeals, at Record, page 41, where the Court distinctly says that this is not a case where a summons and severance was necessary to authorize an appeal by one alone of several defendants, and the Court did not place its decision on any such proposition as that embraced in the said first assignment of error.

II.

The second assignment of error has already been fully replied to in appellees' brief at pages 14, 15 and 16.

III.

The third assignment of error is to the action of the Court in entertaining the motion of the appellee to dismiss the appeal, the appellant claiming that the motion was made too late. In reply to this contention it is sufficient to refer to the opinion of the Court, Record, page 42, where the Court certifies that the attempt by the appellant to introduce Mrs. Padgett and her husband as parties appellees in the Court of Appeals by the alteration of the docket and record covers was only made "a few days before the case was called for hearing," and that "the motion to dismiss was made within twenty days thereafter." Up to the time the change was made Mrs. Leesnitzer appeared on the record as the sole appellee in the Court of Appeals, and neither she nor her counsel could have anticipated the subsequent occurrences in the clerk's office.

In Grigsby vs. Purcell, 99 U. S., 506, *et seq.*, the motion was not made until the hearing and was sustained by this Court. And in the following cases this Court dismissed the appeals *sua sponte* for failure to comply with the rules and requirements respecting appeals to this Court.

The S. S. Osborne, 105 U. S., 447, 451.
Hilton vs. Dickinson, 108 U. S., 165, 168.
Estes vs. Trabue, 128 U. S., 225, 230.
Dolan vs. Jennings, 139 U. S., 385, etc.

IV. AND VI.

Under these two assignments the appellant contends that it was not necessary to the appeal that the supersedeas bond should have included Mrs. Padgett, and that no such bond was essential to the appeal. This bond was required to be given by the decree of the court below (Rec., pp. 33, 34). The action of the Court of Appeals in dismissing the appeal for failure to perfect the appeal in not giving the required bond is sustained by the following cases in this Court:

Veitch vs. Farmers Bank, 6 Pet., 777.
Boyce vs. Grundy, 6 Pet., 777.
Bank vs. Swann, 9 Pet., 33.
The S. S. Osborne, 105 U. S., 447, 451.
Hilton vs. Dickinson, 108 U. S., 165, 166, 168.
Dolan vs. Jennings, 139 U. S., 385, 386, 387, 388.

In Green vs. Elbert, 137 U. S., 621, *et seq.*, this Court dismissed the appeal because of the failure of the appellant to make the deposit of the fees of the clerk within the time required by the rule of this Court, although the fees were subsequently paid and the cause docketed.

Respectfully submitted,

EDMUND BURKE,
Solicitor for Appellees.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1910.

No. 45.

MARGARET E. TAYLOR, APPELLANT,

vs.

MARY J. LEESNITZER, ELIZABETH E. PADGETT, AND FRANKLIN C. PADGETT, APPELLEES.

BRIEF IN REPLY.

J. NOTA McGILL,
J. J. DARLINGTON,
Solicitors for Appellant.

THE LAW REPORTER PRINTING CO., WASHINGTON, D. C.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1910.

No. 45.

MARGARET E. TAYLOR, APPELLANT,

vs.

MARY J. LEESNITZER, ELIZABETH E. PADGETT, AND FRANKLIN C. PADGETT, APPELLEES.

BRIEF IN REPLY.

At page 8, of the brief for appellees, the following are cited as authorities for the proposition that insufficiency of an appeal bond is jurisdictional:

Young vs. Russell, 60 Tex., 684.
Hall Music Co. *vs.* Hall, 120 S. W., Rep., 904.
Senter *vs.* De Bernal, 38 Cal., 637.
Thompson *vs.* Ellsworth, 1 Barb. Ch. N. Y., 624.
Brown *vs.* Levins, 6 Porter, Ala., 414.
U. S. *vs.* Draper, 19 D. C., 85, 88.
McCrandell's Succession, 13 La. Ann., 231.
Kennedy's Succession, 26 La. Ann., 293.
Weegel's Succession, 21 La. Ann., 149.

Young *vs.* Russell arose under article 1400 of the Texas Revised Statutes of 1879, which provided that the bond should be payable "to the appellees or the defendant in error," and that the bond should be held to

be perfected when it had "been filed." It was under the provisions of this statute that the Supreme Court of Texas held the question jurisdictional, saying:

> "In order to confer jurisdiction on the appellate court as to a party to the judgment who is interested in its results, it seems that the appeal bond must be made payable to such party, provided the interest of the appellant in the suit was adverse to such party."

As pointed out in the original brief for appellant, we have no statute in the District of Columbia upon the subject, nor is the rule of the Court of Appeals, the sole requirement of an appeal bond with us, at all similar to the Texas statute. The provisions of the rule are as follows:

> "2. No such appeal, except in cases where the United States or the District of Columbia is appellant, shall operate as a stay of execution or supersedeas unless within such term of twenty days the appellant shall file in the clerk's office of the Supreme Court of the District of Columbia a bond, with surety or sureties, to be approved by one of the justices of said court, conditioned for the successful prosecution of such appeal.
>
> "3. In all causes appealed to this court the appellant shall give bond, to be approved as aforesaid, sufficient to cover the costs of the case, or he may deposit in said clerk's office, with the approval of one of the justices of said Supreme court, a sum of money reasonably sufficient to cover such costs.
>
> "4. The penalty of the respective bonds required by the preceding sections to be such as the Supreme Court of the District of Columbia, or one of the justices thereof, shall prescribe; and if neither the bond required by the preceding second section for stay or supersedeas, nor the bond or deposit of money for security of costs required by the preceding third section, be given or made

> within the twenty days aforesaid, the appeal, if the transcript of the record has not been transmitted to this court, may be dismissed by the court below, or one of the justices thereof, upon application by the appellee; or, if the transcript has been filed in this court, said appeal will be dismissed here, upon motion of the appellee, provided the motion for dismissal in this court be made within the first twenty days next after the receipt of the transcript in this court."

The provisions of this rule, as will be seen, are in no respect more imperative or mandatory than section 22 of the Judiciary Act, U. S. Rev. Statutes, section 1000, which, as pointed out at page 20 of the appellant's original brief in this cause, was held to be directory merely, an omission in compliance with which did not avoid a writ of error.

In Hall Music Co. *vs.* Hall, 120 S. W. Rep., 904, which arose after a change in the Texas statute, the court held that the judgment must be reversed unless the appellee should file a new and corrected bond.

Senter *vs.* De Bernal, 38 Cal., 637, was, simply, the dismissal of an appeal because certain interested parties had not been notified as required by sections 335 and 337 of the California Code.

Thompson *vs.* Ellsworth, 1 Barb. Ch., 624, arose under a statute enacting that the appeal should "not be effectual for any purpose until bond given to the adverse party."

Brown *vs.* Levins, 6 Porter. Ala., 414, held, only, that judgment could not be rendered against the sureties where the bond was not in conformity with the statute. There was no question of the dismissal of an appeal, nor of the effect upon the jurisdiction of a defect in the bond.

U. S. *vs.* Draper, 19 D. C., 85, 88, held, only, that, where an appeal bond was given to the United States

instead of to the appellee, the United States being no party to the suit, action could not be maintained upon the bond.

Kennedy's Succession, 26 La. Ann. 292, 293, is a sim-reference. The other Louisiana cases were simply dismissals for failure to give a proper bond, or for failure to make proper parties,without discussion of the question whether the omission was jurisdictional. That the court, in its discretion, has power to dismiss an appeal for failure to give a suitable bond has not been questioned.

It is stated, at page 12 of the brief for appellees, that the motion below to dismiss, which contained no reference to any supposed defect in or insufficiency of the bond,—

> "was based upon the record as it then stood, and as the docket of the court formerly stood, and as the caption of the printed record in the Court of Appeals, and in this court now stands, which showed that the said Elizabeth E. Padgett was not a party to the appeal."

The record however, was precisely at all stages of the cause the same as it now is; the only "manipulation" of it being the correction by the clerk of the Court of Appeals of the caption which had been prepared by himself, upon its being pointed out to him by the appellant's counsel that he had committed a clerical error therein. The caption, framed in the Court of Appeals by its clerk, after the transcript of the record from the court below had been filed there, was no part of the record.

Even an error in the caption of the citation below, which *is* a part of the record, the Court of Appeals has held to be a clerical error, injuring no one, and by which no one is misled. Leonard *vs.* Rodda, 5 App. D. C., 261–2.

That the appellees could not have been misled to

their detriment by the caption in the printed record of the Court of Appeals, with respect to a motion to dismiss on the ground of an insufficient bond, is manifest. Under the rules of that court, such a motion, as pointed out in the appellant's original brief, must be made within twenty days after the filing of the transcript of the record in that court, which transcript the rules do not require to be printed until within ten days before the time at which the case is assigned for argument (Rule VI), which in the case at bar would have been on February 3, 1908, or nearly seven months after the filing of the transcript.

The action of the Court of Appeals in dismissing the appeal to that court upon an alleged defect in the appeal bond, filed in the court of first instance and not before the Court of Appeals at all, is sought to be defended at page 15 of the brief for appellee by the statutory discretion given that court to require original papers, instead of copies. The provision in question is contained in the act of Congress approved July 30, 1894, and is as follows:

> "Said Court of Appeals shall have power to prescribe what part or parts of the proceedings of the court below shall constitute the record on appeal and the form the bill of exceptions, *and to require that the original papers shall be sent to it instead of copies thereof*, and generally to regulate all matters relating to appeals, whether in the court below or in said Court of Appeals."

The object of this clause of the act is obvious. In cases of alleged alteration, forgery, disputed hand-writing, or the like, it may often be quite desirable that the appellate court should be aided by inspection of the original documents, instead of being restricted to mere copies, but, in every such case, the paper in question, whether represented by a copy or by the original, is a part of the

record, and no litigant is subjected to the anomaly of having his rights determined upon evidence not before the court, which evidence he can not take to a higher court, and with respect to which he has not even been heard by the court which has thus deprived him of what he conceives to be his property.

Following this enactment, the court, by its Rule V, provides that an order will be made for the production of any original papers remaining in the court below the inspection of which shall be shown to be necessary for the correct understanding of any cause, provided a petition shall first have been filed, verified by affidavit, showing proper ground therefor. No such petition and no such order existed in the present case.

In Hudgins *vs.* Kemp, 18 How., 530, it was held that certificates and statements of the clerk of the court below as to matters not contained in the record, could not be received as evidence in the appellate tribunal.

> "The case as therein set forth, is the case before this court. . . . There should have been a motion to amend, by inserting in the transcript the certificates mentioned by the clerk, before the motion was made to dismiss."

A fortiori, an appellate tribunal may not dispose of the rights of litigants upon the results of mere private, extra-judicial inspection of papers *dehors* the record before it, even with notice to the party to be affected by its action—still less without it. Nor could there have been a motion to amend by requiring either a copy of the bond or the original to be produced, for purpose of dismissal on the ground of its supposed insufficiency; because, as pointed out at page 12 of appellant's original brief, the time within which application to dismiss on that ground could have been made had expired more than six months before a motion to dismiss, upon any ground, was made in the case.

Nor is it competent to urge, as is attempted in the opposing brief, that this is a mere question of construction by the Court of Appeals of its own rules, nor is it, as argued, a mere question of practice. It is not suggested by the learned court below, in either of its opinions in this case or elsewhere, that there is any one of its rules under which it may dismiss appeals to it upon grounds nowhere contained in nor discoverable from its records, nor without opportunity to be heard. Nor has its Rule X been construed in this case, or in any other, as permitting dismissal for an insufficient bond where no application to that end has been made within the twenty days prescribed by it for that purpose. On the contrary, as pointed out at page 13 of appellant's original brief, that court has uniformly held, both upon the authority of this court and its own decisions, that its rules are binding upon it, and that they can not be dispensed with even to meet rather than to inflict, a hardship in a particular case.

The proposition that the dismissal of an appeal upon a ground not contained in the record, with the resulting deprivation of an appellant's property rights, may be upheld by designating it a question of practice, is equally untenable.

Respectfully submitted.

J. NOTA McGILL,
J. J. DARLINGTON,
Solicitors for Appellant.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1910.

No. 45.

MARGARET E. TAYLOR, IN HER OWN RIGHT AND AS EXECUTRIX OF THOMAS TAYLOR, DECEASED, APPELLANT,

vs.

MARY J. LEESNITZER, ELIZABETH E. PADGETT AND FRANKLIN C. PADGETT.

BRIEF ON BEHALF OF APPELLEES.

The appellant, together with Elizabeth E. Padgett and Franklin C. Padgett, her husband, are defendants to the bill for partition of certain real estate in the City of Washington, District of Columbia, filed by Mary J. Leesnitzer in the Supreme Court of the District of Columbia in equity. Mrs. Padgett being a sister of the complainant and equally interested in having partition of the lands appeared to the suit in person and without an attorney and by her answer admitted the allegations of the bill. The defendant, Margaret E. Taylor, demurred to the bill, which was overruled by the trial court. She elected to stand upon her demurrer and refused to an-

swer or further plead to the bill, and thereupon the trial court proceeded to final decree for sale and partition of the land, from which decree overruling the demurrer the said Margaret E. Taylor appealed to the Court of Appeals of the District of Columbia. On motion of the appellee, Mary J. Leesnitzer, the appeal was dismissed with costs (Record, p. 37). Opinion of Mr. Justice Robb (Record, p. 36). Subsequently and at the same term the said Margaret E. Taylor, the appellant in said cause, moved the said court for the modification of the said decree of dismissal by allowing the appellant leave to amend and correct her appeal by citing in the omitted parties, the said Elizabeth E. Padgett and Franklin C. Padgett, by a citation from the said Court of Appeals and invoked the favorable exercise of the discretion of the court in the premises (Record, pp. 37, 38). This motion was resisted by the said Mary J. Leesnitzer, the only party appellee in the record on said appeal (Record, pp. 39, 40). The court upon the merits of the said motion found the following facts:

1. That the printed record on appeal showed that Mary J. Leesnitzer is the only person made a party appellee to the said appeal.

2. That the cause was docketed in the Appellate Court against her as sole appellee.

3. That subsequently without the knowledge or authority of the court the clerk upon the request of appellant's counsel supplemented the record by adding the names of the omitted parties upon the docket as appellees.

4. That at like solicitation the covers on the printed record were stripped off and replaced by others containing the names of the omitted parties.

5. That the supersedeas bond required by the rules of the Court of Appeals and by the decree of the court below (Record, pp. 33-34), as a prerequisite to the taking and docketing of the appeal in said Court of Appeals had been executed by the appellant in favor of Mary J. Leesnitzer alone as sole obligee, and not in favor of the said Elizabeth E. Padgett in violation of Rule X of the Court of Appeals.

6. That the said Elizabeth E. Padgett was a necessary party to the said appeal as her rights equally with those of her sister were involved in its affirmance or dismissal, and that she had not been made such a party.

The court thereupon overruled the appellant's motion for leave to amend and correct the appeal by bringing in a necessary party who had been omitted in taking the appeal (Record, p. 45). Opinion of Chief Justice Shepherd (Record, pp. 41, 42, 43, 44). And on motion of the appellant an appeal was allowed to this court by said Court of Appeals (Record, pp. 46, 47).

No assignment of errors is contained in the record and no brief specifying errors has been filed on behalf of the appellant although the cause is on the regular call for hearing. Appellee's counsel is therefore put at a great disadvantage in complying with the third section of Rule 21 of this court requiring his brief to be filed within the time specified therein, as counsel is not informed in what particulars the decree of the court will be assailed as erroneous. The opinion of the Court of Appeals, however, is believed by counsel to be complete and unanswerable and could be safely relied upon to meet any objections of the appellant to the decrees of the court. It may, however, be not improper to invite the attention of this Hon-

orable Court in the first place to the powers of the Court of Appeals under the provisions of the organic act creating the court.

Section 6 of the act of Congress establishing the Court of Appeals of the District of Columbia, approved February 9, 1893, as amended by the act approved July 30, 1894, provides:

> "That the said Court of Appeals * * * shall make such rules and regulations as may be necessary and proper for the transaction of its business and the taking of appeals to said court. And said Court of Appeals shall have power to prescribe what parts of the proceedings of the court below shall constitute the record on appeal * * * and to require that the original papers shall be sent to it instead of copies thereof, and generally to regulate all matters relating to appeals whether in the court below or in said Court of Appeals. * * * That all motions to dismiss appeals and other motions may be heard by two justices in the absence or disqualification of any one of the justices aforesaid."

By Section 10 of said amendatory act it is provided "that the opinion of the Court of Appeals in every case shall be rendered in writing and shall be filed in such case as a part of the record thereof."

The organic act conferred plenary power upon the Court of Appeals to make all necessary and proper rules for the taking of appeals to that court for its own administration or that of the court below. The binding effect of these rules upon litigants and the courts as to methods of procedure cannot now be open to question.

Rules which are enacted by virtue of statutory author-

ity and which are mandatory in their terms have the force of law and should be construed in the same manner as statutes.

> Enc. of Pleading & Practice, Vol. 18, page 1262, and cases cited in Note 1.

This court quoted and adopted what was said in Thompson vs. Hatch, 3 Pick., 512, viz:

> "A duly authorized rule of court has the force of law, and is binding upon the court as well as upon parties to an action, and cannot be dispensed with to suit the circumstances of any particular case."

> Rio Grand & Co. vs. Gildersheeve, 174 U. S., 608-609. Followed in Drew vs. Gogan, 25 App. D. C., 55; Talty vs. Dis. of Col., 20 App. D. C., 489; Dis. of Col. vs. Humphries, 11 D. C., 68; Dis. of Col. vs. Roth, 18 App. D. C, 547.

First. The first question presented by appellees is whether or not this court will entertain an appeal from the decrees of an intermediate appellate tribunal applying and enforcing its own rules. It is not denied that this court in a proper case where the authority of court below to make the rule, or where its validity or constitutionality is brought in question, will take cognizance of the subject on appeal.

> Fidelity & Deposit Co. vs. U. S., to the use of Smoot, 187 U. S., 315.

The supersedeas bond in this case as a prerequisite to

perfecting the appeal was required by the decree to be in accordance with the rules of the Court of Appeals, which having been made by authority of law are conclusive and not open to question on appeal. If such were not the case manifest inconveniences would follow. The vast business of this court would be obstructed and halted to wait upon the consideration of petty questions of practice in the courts of first instance filtered through the Appellate Court in cases where in other respects this court would have jurisdiction.

The general principle upon this subject has been stated as follows:

> "Each court is the best judge of the rules which it has adopted, and an appellate court will regard the construction placed upon its own rules by an inferior court as conclusive, and will not interfere except in case of gross and palpable abuse."
>
> Enc. Pl. & Pr., Vol. 18, pp. 1262-1263, cases cited in Note 1.

A large number of cases from the appellate courts of different States is cited in said note, and among them is Duncan vs. U. S., 7 Pet. (U. S.), 435, wherein it is said at pages 451-452:

> "On a question of practice under the circumstances of this case it would seem that the decision of the district court, as above made, should be conclusive. How can the practice of the court be better known or established than by its own solemn adjudications on the subject?"

Second. If, however, the court should entertain this appeal upon the merits, then it is submitted that the ac-

tion of the Court of Appeals was plainly right in the premises. The practice with respect to the persons who are to be obligees in appeal bonds has long been established in the District of Columbia.

In U. S. vs. Draper, 19 D. C., pp. 85, 88, Justice Cox in the Supreme Court of this district said:

> "The settled practice in the State of Maryland and in this district is for the appellant in an equity suit, or the plaintiff in error in a law suit, to execute a writ of error or appeal bond to his adversary."

It is equally well settled that those denominated as adversaries include all whose interests in the decree appealed from will be affected by an affirmance, reversal or modification on appeal.

The appeal bond is fatally defective unless all the parties adversely interested, that is, interested in maintaining the judgment appealed from are made obligees on the bond. And it matters not whether a party is plaintiff, defendant, or intervenor in the trial court, if he is adversely interested to the party appealing he must be made an obligee in the bond, and unless so protected the appeal will be dismissed. Where the bond is required to be made payable to the appellee he must be regarded as the party in the judgment in whose favor it has been wholly or partially rendered, and who does not appeal from it; that is to say, the party who has an interest adverse to setting aside the judgment and whose interest in relation to the subject of the appeal is in conflict with the reversal or modification of the decree appealed from irrespective of the question whether he appears upon the face of the

record in the attitude of complainant, defendant or intervenor.

Young vs. Russell, 60 Tex., 684.
Hall Music Co. vs. Hall, 120 S. W. Rep., 904.
Senter vs. De Bernal, 38 Cal., 637.
Thompson vs. Ellsworth, 1 Barb. ch. N. Y., 624.
Brown vs. Levins, 6 Porter, Ala., 414.
U. S. vs. Draper, 19 D. C., 85, 88.
McCrandell's Succession, 13 La. Ann., 231.
Kennedy's Succession, 26 La. Ann., 293.
Weegel's Succession, 21 La. Ann., 149.

The appeal bond must be in favor of all the persons in interest which the appeal is intended to bring before the court, otherwise there can be no decree for or against them, and where the appeal bond was in favor of one only of several appellees there was no authority in the court to allow the appellant to amend where the effect would be to bring new parties before the court. In such case there was no sufficient bond to bring the parties before the court to act upon them for any purpose and the appeal was dismissed.

The City of Lincoln, 19 Fed. Rep., 460.

It is most respectfully submitted to this court that the judgments and decrees of the Court of Appeals complained of should be affirmed.

EDMUND BURKE,
Solicitor for Appellees.

Whilst the foregoing brief was being printed counsel for appellees received a copy of the brief filed on behalf of appellant.

The appellant's brief to page 4 inclusive contains an argument upon the merits of the demurrer to the bill, which it is submitted has no relevancy to the questions before this Court, and what is therein contained is well said by counsel, at page 4 of their brief, that it is "without materiality upon the present appeal," and would not be now noticed except that for some purpose not clearly disclosed the attempt is made to array the decisions of the Court of Appeals in opposition to Hardenbergh vs. Ray, 151 U. S., 112. It is most respectfully submitted there is no such antagonism as counsel claims, and they are very greatly mistaken in stating that the decision in Hardenbergh vs. Ray was "under a statute exactly similar in its provisions," as a casual glance at that case will disclose, and that the decisions of the Court of Appeals in Bradley vs. Matthews, 9 App. D. C., 438, and in Crenshaw vs. McCormick, 19 D. C. App., 494, interpreting the said Act relating to a devise of after acquired real estate reached no conclusion in opposition to the decision in Hardenbergh vs. Ray, as the opinion in Hardenbergh vs. Ray announced a general proposition of law and had no relation or reference to the exception or restrictions as to a devise of after acquired real estate contained in the statute relating to the District of Columbia. The decisions of the Court of Appeals followed the decision of this Court in Carroll vs. Carroll, 16 How. (U. S.), 280, and are to be found in the following cases:

McAleer vs. Schneider, 2 D. C. App., 461;
Matthews vs. Matthews, 9 D. C. App., 438;
Crenshaw vs. McCormick, 19 D. C. App., 494.

These decisions of the Court of Appeals construing the Act of Congress of January 17, 1887, 24 Stat. at Large, 361, were rendered prior to the amended Code of D. C., 1902, Sec. 1628, which is a re-enactment of the said Act of January 17, 1887, and it is a familiar rule that where statutes have received a judicial interpretation and are subsequently re-enacted the construction previously given to the statute must be regarded as being impressed upon the re-enacted statute.

Sutherland on Stat. Con., 2nd Ed., Vol. 2, Sec. 403;

McKee vs. McKee, 17 Md., 452;

Magnus vs. McClelland, 93 Va., 789;

In re Guggenheim Smelting Co., 121 Fed. Rep., 153;

Sessions vs. Romadka, 145 U. S., 29;

Strasburger vs. Dodge, 12 App. D. C., 37-48-49-50.

Especially where title to lands are involved the necessity of adhering to the previous construction of statutes becomes the more imperative, as titles to real property are based upon judicial interpretation of statutes.

Minnesota Co. vs. Nat. Co., 3 Wall. (70 U. S.), 332-334;

Lyon vs. Burtis, 20 Johnson Rep., 487;

Shreeve vs. Cheesman, 69 Fed. Rep., 785-790-1-2.

While counsel for appellees as before said concurs with the counsel for the appellant that the whole matter is without materiality upon the question arising upon this appeal, yet he feels that it is due to the Court of Appeals of the District of Columbia to refute any sugges-

tion directly or indirectly made that that court had in any manner refused to yield obedience to the adjudications of this court.

The court's attention is called to the following statement of appellant's brief at page 5: "a motion by Mrs. Leesnitzer was filed by the solicitor for Mrs. Padgett to dismiss the appeal &c." The appellant's counsel have themselves fallen "into a curious error" as by reference to the stipulation between counsel for the appellant and appellees filed herein it is agreed that the motion to dismiss the appeal copied into this record on appeal to this court is erroneously printed at page 35, and that in lieu thereof, the motion as contained in the stipulation of counsel and filed herein is a true copy of the original, which was lost, and that the corrected copy shows that the motion to dismiss was made by counsel for the then only appellee in the Court of Appeals, to wit, Mary J. Leesnitzer, and that there was no appearance either in the lower court or the Court of Appeals on behalf of the appellee Elizabeth E. Padgett, and this is shown to be true by an inspection of the record. It is submitted that it is hardly permissible for the learned counsel to argue against the truth of their own stipulation.

I.

Counsel for appellant at page 6 of the brief claims in the first assignment of error that the court erred in dismissing the appeal "for want of summon and severance." At page 7 of appellant's brief they say the sole ground upon which the motion to dismiss was made was for want of summons and severance, and later on they say that the ground upon which the appeal was

dismissed, as shown by the first opinion, was abandoned in the second and a new ground sought to be substituted therefor, and this is again reiterated at page 8 of the said brief. In this respect counsel for appellant seemingly have overlooked the first assignment of the reasons for the motion to dismiss contained in said motion, namely, because the said Elizabeth E. Padgett "having a substantial interest adverse to the appellant in the maintenance of the decree appealed from in this cause, and who will be affected by its modification or reversal, *has not been joined either as an appellee or appellant, or as a party hereto.*" This motion was based upon the record as it then stood, and as the docket of the court formerly stood, and as the caption of the printed record in the Court of Appeals and in this court now stands, which showed that the said Elizabeth E. Padgett was not a party to the appeal. The brief opinion of Mr. Justice Robb to be found in the record and in 31 App. D. C., 94, is as follows:

> "Mrs. Padgett and her sister have a joint interest in the matter of the decree appealed from, *but Mrs. Padgett was not made a party to the appeal.*"

Chief Justice Shepherd, in the opinion delivered by him, held that inasmuch as Mrs. Padgett was jointly interested in the subject-matter of the decree appealed from "That appeal, to be effective, must be against her as well as against the complainant * * * that it could not be reversed as to the one and not as to the other. * * * The reason therefor for requiring both to be made *parties to one appeal* is even stronger &c." Again the Chief Justice says, "In the present

case on the other hand the omitted party was opposed, in interest to the appellant, and was the beneficiary, jointly with the appellee, of the decree sought to be reviewed. The decree being in her favor, she was interested in its maintenance and opposed to its review. To a proceeding to review it, *she was a necessary party.* * * * To permit her now to be brought in *and made a party to the appeal* would be to set aside the rule which is the law of the court as well as of the parties."

It is submitted that these extracts from the motion to dismiss, and the first opinion of the court delivered by Mr. Justice Robb, and the second opinion, delivered by the Chief Justice, are all to the effect that Mrs. Padgett was a necessary party to the appeal, and the order of dismissal was founded upon the omission of the appellant to make her such party. More than that, in the motion filed by appellant's counsel to set aside the decree of dismissal they ask permission to correct and amend the appeal by citing in Mrs. Padgett as an *omitted party.* And following the record the appellant, in the supersedeas bond on appeal to this court, recites that "whereas lately in the Court of Appeals of the District of Columbia in a suit depending in said court between Margaret E. Taylor and Mary J. Leesnitzer * * * a decree was rendered against the said Margaret E. Taylor," &c. (Rec. p. 47), all of which demonstrate that the action of the Court of Appeals was founded upon the fact that Mrs. Padgett was not made a party to the appeal in that court, and that the statements in the appellant's brief, or any inferences to be adduced therefrom, that the motion for the dismissal was based on the sole ground of want of summons and severance is plainly erroneous, and that the criticism of the Court

of Appeals based upon the theory that the two opinions are inharmonious and conflicting is likewise untenable.

It is submitted from the foregoing that the first assignment of error by the appellant at page 6 of the brief is not well taken and should be overruled.

II.

The appellant's second assignment of error is based upon the proposition that the appeal was erroneously dismissed because the record furnished no foundation for the Court's action. In support of this proposition the appellant, at page 8 of the brief, refers to Rule V, paragraph e, of the Rules of the Court of Appeals. Counsel argue that the supersedeas bond was not before the Court (Brief, p. 8) because not brought up by certiorari or other application, yet he bases his argument upon the said Rule V, which is not before this Court in any manner, except as in the manner presented in their brief, and quoting the language at said page "How, under these circumstances could the appellate court take cognizance of it for any purpose * * *?" They further find fault with the action of the court in examining the said supersedeas bond for the purpose of determining whether Mrs. Padgett had been brought up as a party to the appeal. The manipulation of the docket and the record covers in the effort to make it appear that Mrs. Padgett was a party having been manifested to the Court as set forth in the opinion of the Chief Justice (Rec. p. 42) and not in any manner controverted or denied in appellant's brief, page 9, it was the duty of the Court to inspect the said supersedeas bond as well for the advantage of the appellant as that of the appellee in

that Court in order to arrive at the exact truth of the matter, and notwithstanding the criticism of the Court in that respect found on page 8 of their brief, there is express statutory authority found in the organic act conferred upon the Court "to require that the original papers shall be sent to it instead of copies thereof," as provided in the Act of Congress approved July 30, 1894. The appellant cites in excuse of the changes in the record Leonard vs. Rodda, 5 App. D. C., pp. 261-2, and contends that the error was merely clerical, but that case merely holds that an error in the citation, which was duly served upon the appellee, was sufficient notice of the appeal, although the name "United States" in the caption of the citation was used instead of the name of the Warden of the jail, but that the notice of appeal was in the name of the proper party appellant. Said case, therefore, is not an authority for the position assumed in the brief. The appellant, further discussing said assignment of error at page 10, likens the question before the Court of Appeals to that of the trial of a cause before a court upon an issue joined, and in discussing the question of the allegata and probata, says there is nothing to sustain the decree of dismissal, except the allegations in that regard contained in the opinion of the court below. It is respectfully submitted that what is said by counsel is not germane to a proceeding dismissing appeals because of failure to perfect an appeal upon noncompliance with the rules of court. In the first place, in matters relating to dismissal of appeals for failure to note the appeal in time, or citation to issue in time, to file the transcript of the record or give the bond within the time required by the rules of the Court, the record is necessarily silent, and presents a mere negative. In such case

there could not be probata, and to say that the action of the Court in dismissal of appeal for such causes will be reversible, unless the record contained both allegations and proof, will in effect emasculate the powers of the Court, and render its rules null and abortive. In the second place there was the allegata in the motion of the counsel for the appellee, Mrs. Leesnitzer, and the probata consisted in the supersedeas bond, and in the record to which it was applicable. And in the third place by Section 10 of said Act amending the organic Act establishing the Court of Appeals it is especially provided that the opinion of said Court in every case shall be filed as part of the record thereof. The entire argument of the appellant proceeds upon the concession that the supersedeas bond ran only to Mrs. Leesnitzer, as the sole obligee, and it is further argued by appellant at page 14 of the brief under the fourth assignment of error that it was not necessary that the appeal bond should run to the defendant, Mrs. Padgett. If this Court, notwithstanding the opinion of the court below and the concession of the appellant as to the nature and character of the said supersedeas bond, should require the production of the bond itself to be made a part of the record in this Court in determining the truth or falsity of the terms thereof upon the question of fact, it is believed that this Court, before reversing the court below, would require the certification of said bond or a duly certified copy thereof to this Court. In this view, all of what has been said in appellant's brief under the second assignment of error and the numerous authorities cited on pages 10 and 11 thereof have no application to the question raised by said assignment, and it is submitted that the same should be overruled.

III, IV AND VI.

The third, fourth and sixth assignments of error are assimilated and for brevity may be classed under one branch of the argument. As to the third assignment of error the appellant contends that a motion for dismissal was made too late to authorize the court to take action thereon. In answer to this it is only necessary to call the attention of the court to the facts that as the record stood before the alteration it furnished no notice that the appeal was designed to embrace Mrs. Padgett, and as shown by the opinion of the Court of Appeals that the motion to dismiss was made within twenty days after the cause had been docketed as to her and the covers changed on the transcript of the record. (See opinion, Rec. p. 42.)

In respect to the fourth assignment of error that it was not necessary to the validity of the appeal that the supersedeas bond should have been made to run to Mrs. Padgett, counsel for appellee submits in opposition to that contention what is said on pages 6, 7 and 8 of appellees' brief, and the authorities cited thereon. The only authority which they cite to sustain this positon is Scruggs vs. R. R. Co., 26 Lawyers Co-Op. Ed., 741. In that case a bond for costs was executed by two of the appellants only, and made payable to one of two appellees. A cost bond, although given to one of a number of appellees, necessarily is sufficient because it stands security for all the costs in the cause, and therefore is for the benefit of all, and in this respect it differs from a supersedeas bond to one of two appellees, as the obligation of a supersedeas bond is personal to the obligee or obligees named in the bond, and so the court, in denying

the motion in that case distinguished between the two classes of bonds, the court saying, "The appeal does not operate as a supersedeas, the security is for costs only." That case is therefore directly in the teeth of the appellees' contention.

Under the sixth assignment of error appellant, at page 20, asserts the proposition that no supersedeas bond is essential to the validity of the appeal, and in support thereof cites decisions of this court, but these decisions rest upon the discretionary power of this court under provisions of the Revised Statutes of the United States, Secs. 1000-1005-1007, which are in the nature of statutes of Jeofails allowing amendments, and have no applicability to the Court of Appeals of the District of Columbia.

U. S. ex rel Mulvihill vs. Clabaugh, 21 App. D. C., 440.
Darlington vs. Turner, 24 App. D. C., 573-592.

These cases reviewed the decisions of the Supreme Court of the United States and defined the distinction between the powers and practice of that court and those of the Court of Appeals.

V.

By the fifth assignment of error the appellant contends that the court refused to exercise its discretion upon the motion for the modification of the decree and for leave to amend and correct the appeal by citing in the omitted parties. Appellant's motion, at pages 37 and 38 of record, discloses that the appellant's counsel made

oral application to the court on the argument of the motion to dismiss for such leave to amend and correct the appeal, and the court, in considering the motion to dismiss and sustaining the said motion, necessarily took into consideration the exercise of any discretion favorable to the appellant, and by its decision exercised its discretion and refused the application and dismissed the appeal. At pages 18 and 19 of the applicant's brief it is said the court below falls into a curious error in the citation of Estes vs. Trabue, 128 U. S., 225-229, for the proposition that a defect or an omission cannot be supplied in an appeal bond in an appellate court. They further say that Estes vs. Trabue holds the contrary, that an error in an appeal bond may be corrected in the appellate tribunal. It is only necessary to examine the opinion in the said case to show the error in which counsel have fallen, for in that case nothing was said about correcting the appeal bond, but what was said related to the amendment of the appeal which was taken in the name of a firm, in the case of Moore vs. Simonds, 100 U. S., 145, and the Court of Appeals, in its opinion, did not cite the said case in support of the proposition that an omission or defect in the bond could not be supplied in the appellate court.

Respectfully submitted,

EDMUND BURKE,
Solicitor for Appellees.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1910.

No. 45.

MARGARET E. TAYLOR, APPELLANT,

vs.

MARY J. LEESNITZER, ELIZABETH E. PADGETT AND FRANKLIN C. PADGETT, APPELLEES.

BRIEF FOR APPELLANT.

J. NOTA McGILL,
J. J. DARLINGTON,
Solicitors for Appellant.

LAW REPORTER PRINTING CO., WASHINGTON, D. C.

lor, by his will (Rec., pp. 10–11), devised and bequeathed "unto my dearly beloved wife, Margaret E. Taylor, her heirs and assigns, all of my estate, both real and personal," and nominated her executrix, without bond; that, subsequently to the date of his will, he had acquired three additional parcels of real estate, described in paragraph five of the bill, which after acquired property the bill alleged did not pass under the will; that Margaret E. Taylor had duly probated the will and qualified as executrix thereunder, unaccompanied by any renunciation under it or election to take dower in lieu thereof, by reason of which fact the complainant claimed she was barred of dower in the after acquired realty, but that, since the death of her husband, she had been in receipt of the rents, issues and profits thereof, and would continue to collect the same unless otherwise ordered by the court; and that the complainant and the defendant Elizabeth E. Padgett were the heirs at law of Thomas Taylor, the defendant Franklin C. Padgett being sued in his capacity of husband to Elizabeth E. Padgett. The prayers of the bill were that the complainant might have partition of the real estate between herself and Elizabeth E. Padgett as tenants in common, that Margaret E. Taylor might be decreed to be barred of her dower in the after acquired real estate, and that a receiver should be appointed by the court to collect the rents and income therefrom pending the suit, and for general relief. The defendants Padgett answered, admitting the allegations of the bill; the defendant, Margaret E. Taylor, demurred to it, and, the Supreme Court of the District of Columbia having overruled the demurrer (Rec., p. 14), she elected to stand upon it, whereupon that court passed its final decree (Rec., pp. 32–4), directing the sale of the real estate in controversy, for partition between the complainant Mary J. Leesnitzer and the defendant Elizabeth E. Padgett and barring appellant's

dower right therein, from which decree, as noted in it (Rec., pp. 33–4), the appellant in open court prayed and was allowed her appeal, to act as a *supersedeas*, in the penal sum of one thousand dollars ($1,000), which bond was duly filed (Rec., p. 34).

The bill, it will be observed, was for partition between the complainant and one of the defendants, both out of possession, against another defendant, namely, the appellant, who was in possession and claiming adversely, which circumstance, alone, was sufficient justification for the demurrer. The principal point of controversy presented by the pleadings, however, was the question whether Thomas Taylor's devise to his wife, her heirs, and assigns of "all of my estate, both real and personal," was sufficient to pass his after-acquired realty, the statute in force in the District of Columbia at the time of the execution of the will being that of January, 17, 1887 (24 Stats. at Large, 361), as follows:

> "Any will hereafter executed, devising real estate in the District of Columbia, from which it shall appear that it was the intention of the testator to devise property acquired after the execution of the will, shall be deemed, taken, and held to operate as a valid devise of all such property."

Under a devise of "all my right, title, and interest in and to all my lands, lots, and real estate," under a statute precisely similar in its provisions, this court had held in Hardenbergh *vs.* Ray, 151 U. S., 112, that lands acquired after the will passed to the devisee.

> "This disposition, residuary in character, is utterly inconsistent with an intention to die intestate as to any portion of his estate, real or personal. When the words of the will of the testator will fairly carry, as in the present case, the whole estate of which he dies seized or possessed, there is no presumption of an intention to die intestate as to any part of his property."

On the other hand the Court of Appeals, in Bradford *vs.* Matthews, 9 App. D. C., 438, and in Crenshaw *vs.* McCormick, 19 App. D. C., 494, both decided subsequently to Hardenbergh *vs.* Ray, reached the opposite conclusion. Hardenbergh *vs.* Ray is cited in the briefs of counsel for devisee in each of those cases, but is not distinguished or referred to in any way in the opinion of the court. The demurrer of the appellant was overruled by the Supreme Court of the District of Columbia on the ground that, although that court was unable to do so, it felt bound to assume that, the Court of Appeals, with Hardenbergh before it, having twice held after acquired realty not to pass under such a will, that court had foud a satisfactory ground of distinction to exist. The appellant thereupon appealed, for the purpose of securing, if possible, a review of its decision of the question by the Court of Appeals, and, failing in that, to have her rights in respect of the property in controversy determined by this court.

While without materiality, perhaps, upon the present appeal, it may be noted that Bradford *vs.* Matthews and Crenshaw *vs.* McCormick are in opposition, not only to Hardenbergh *vs.* Ray, but to the decisions in all other jurisdictions where similar statutes have presented similar cases for determination.

Cushing *vs.* Alwynne, 12 Metc., 169.
Pray *vs.* Waterston, 12 Metc., 262.
Winchester *vs.* Fosster, 3 Cush., 369.
Brimmer *vs.* Sohier, 1 Cush., 118.
Wait *vs.* Belding, 24 Pick., 129.
Pruden *vs.* Pruden, 14 Ohio St., 251.
McClasher *vs.* Barr, 54 Fed. Rep., 787, 796.
Briggs *vs.* Briggs, 69 Iowa, 619.
Missionary Society *vs.* Mead, 131 Ill., 318.
Patty *vs.* Gooldsby, 51 Ark., 61.
Doe *vs.* Wynne, 23 Wisc., 251, 256.

The transcript of record, upon the appeal, was filed in the Court of Appeals on the 17th day of July, 1907 (Rec., p. 34), the cause came on for argument on February 13, 1908 (Rec., p. 35), and on the immediately preceding day, February 12th, a motion by Mrs. Leesnitzer was filed by the solicitor for Mrs. Padgett to dismiss the appeal on two grounds, only, namely; that she had not been sued, either as appellee, appellant, or as a party, and, secondly, that there had been no summons and severance, or service and notification of appeal upon her; and, after argument of the cause upon its merits, the Court of Appeals granted the motion to dismiss, on the ground that, because of the absence of a summons and severance, "Mrs. Padgett was not made a party to the appeal" (Rec., p. 36). Thereupon, upon application by the appellant for a modification of the decree by permitting a summons and severance in the Court of Appeals, in analogy to its own precedents (Slater *vs.* Hamacher, 15 App. D. C., 294, 299, 568), if the court, in view of Leonard *vs.* Rodda, 5 App. D. C., 262–3, and Shepherd *vs.* Pepper, 133 U. S., 644–5, should adhere to its view that summons and severance were necessary notwithstanding an appeal taken in open court, and notwithstanding Winters *vs.* U. S., 207 U. S., 574–5, and other authorities to like effect which were brought to its attention, the Court of Appeals filed a second opinion in the cause (Rec., pp. 41–4), in which it abandoned the view that summons or severance was necessary, but nevertheless proceeded to dismiss the appeal upon a new ground, not only not embraced in the motion to dismiss, but not in any manner presented by or discoverable from the record before it, namely, on the ground that, in the Supreme Court of the District of Columbia, the appeal bond had run to the complainant, Mrs. Leesnitzer, alone, instead of to her and the defendant, Elizabeth E. Padgett. As will be seen by examination of this second

opinion, the action of the court appears, further, to have been based upon findings of fact by it as to alleged transactions or communications between its clerk and the counsel for the appellant, etc., no allegations or issues as to any of these facts having been raised in the record, nor any opportunity afforded the appellant to be heard in respect of them, if they were at all material.

From the action of the Court of Appeals in thus dismissing her appeal from the decree of the Supreme Court of the District of Columbia the appellant has taken the present appeal in this court.

Assignments of Error.

The Court of Appeals of the District of Columbia, it is respectfully submitted, erred in the following particulars:

I. In dismissing the appeal for want of summons and severance.

II. In dismissing the appeal upon a ground or grounds for which no foundation is found in the record.

III. In dismissal for alleged want of a sufficient appeal bond, after the time within which the question of its sufficiency was capable of being raised by the appellees, or considered by the court, under its own rules.

IV. In holding it necessary that the appeal bond should run to the appellant's co-defendant, Mrs. Padgett.

V. In holding that the court was without discretionary power to permit the appellant to amend the appeal bond, or to file a new one.

VI. In holding that an appeal bond was essential to the validity of the appeal.

I.

Summons and Severance.

That the court below erred in granting the motion to dismiss the appeal for want of summons and severance, the sole ground upon which the motion to dismiss was based, is clearly apparent, and this for several reasons.

In the first place, the appeal was taken in open court, and its allowance noted in the very decree appealed from, which circumstance obviates the necessity of citation (Milner *vs.* Meek, 95 U. S., 252; R. R. Co. *vs.* Blair, 100 U. S., 661; Dodge *vs.* Knowles, 114 U. S., 430; Shepherd *vs.* Pepper, 133 U. S., 644–5; Leonard *vs.* Rodda, 5 App. D. C., 262–3), and of summons or severance (McNulta *vs.* West Chicago Park, 99 Fed., 328; Rice Co. *vs.* Libbey, 105 Fed., 825; 3 Foster's Fed. Prac., 4th ed., 2056).

In the second place, the rule requiring summons and severance applies only to joint judgments or decrees, and has no application to a case like the present, in which the interest of the party appealing is separate from that of the other defendants.

> Winters *vs.* U. S., 207 U. S., 574, and authorities cited.

Inasmuch, however, as the court below, in its second opinion (Rec., p. 41), concedes that the decree appealed from is not joint, and the ground upon which the appeal was dismissed, as shown by its first opinion, is abandoned and a new ground sought to be substituted therefor, it can not be necessary to pursue further the objection founded on want of summons and severance, which, as stated, is in effect the sole ground of the only motion to dismiss contained in the record, or made in the cause.

II.

The Dismissal Fatally Erroneous, Because Founded on Grounds Wholly Outside the Record.

Abandoning the ground assigned in its first opinion for the dismissal of the appeal (Rec., p. 36), the court below, in its second opinion (Rec., pp. 41–44), places its action upon the ground that the appeal bond should have run to the defendant Elizabeth E. Padgett, as well as to the complainant Mary J. Leesnitzer.

Rule V, paragraph *e*, of the rules of that court provides that all appeal bonds shall be omitted from the record on appeal, followed by a provision in paragraph *f* that any party may have the right to direct any part of the proceedings, which would otherwise be omitted under the rules, to be incorporated into the transcript, subject to the costs of its incorporation in the event that it should be deemed by the court not to be material. Under the operation of these rules, the appeal bond was omitted from the transcript of record to the court of appeals, nor was it subsequently brought up by *certiorari* or other application made to the court for that purpose. How, under these circumstances, could the appellate court below take cognizance of it for any purpose, and especially for the purpose of dismissing the appellant's appeal, presented by her before it upon a record then, and still, sufficient in all respects, under its own rules? How could an appellate court leave its habitat, betake itself to the file rooms and records of another court, and arrive at conclusions of fact, based upon private investigations of its own, of which the party to be affected thereby has had no notice, and, as a result of such procedure, deprive such party of his day in court for the maintenance of his property rights?

In the second opinion of the court below, it is set forth that appellant's counsel a few days before the hearing, and

without leave of the court, informed the clerk that the case had not been properly docketed, that Mrs. Leesnitzer was not the only appellee, and that the docket and cover of the records should be corrected to show that fact. Assuming for present purposes that these facts were duly ascertained, after notice and opportunity to be heard, and that they duly appear of record, their bearing upon the case is not apparent. The appeal in open court was, as the opinion concedes, as effectual against Mrs. Padgett and her husband as against Mrs. Leesnitzer; it made them as well as her appellees, and it was a clerical error or inadvertence upon the part of the clerk to adopt a caption which excluded them, the direction of his attention to which fact would scarcely seem to call for leave of court. Especially would this seem to be true of a court which had decided that a clerical error of this description in no way affects the appeal.

Leonard *vs.* Rodda, 5 App. D. C., pp. 261–2.

The decree of dismissal becomes still more difficult of apprehension in the light of the fact that, not only is the ground of objection in question not discoverable in the record, but the objection itself is equally absent from it. The motion to dismiss (Rec., p. 35), to which, alone, the appellant was called upon to respond, presented only the question of the necessity of summons and severance, neither of which, as the court ultimately found, was necessary; nor could the dismissal be based upon the conceded power of appellate courts, in some instances, to dismiss appeals upon their own initiative, for the reason, first, that this power is exercised only for want of jurisdiction, or for failure to comply with requirements necessary to the hearing of the case in the appellate tribunal, such as printing the record, filing briefs and the like, and, in the second place, because there is no instance either of the exercise or the claim of such a

power upon grounds not contained in or discoverable from the record. "The maxim applies that what does not appear is to be presumed not to exist."

Prout *vs.* Robey, 15 Wall., p. 475.

That there must be before the court a sufficient record to enable it to decide all the questions properly arising under the appeal, has been decided by the Court of Appeals, itself, in Norment *vs.* Edwards, 6 App. D. C., 207, and upon the authority of this court in R. R. Co. *vs.* Schulte, 100 U. S., 644. Without such a rule, and adherence to it, suitors would be deprived of their right of appeal to a higher tribunal; for, if the court below may dispose of the rights of parties by matters *dehors* the record, the parties must be powerless to secure revision or review elsewhere, since the court above can not be advised by the record either of the grounds upon which the action below was based, or as to their validity or sufficiency.

In order to judicial action, it is essential that the *allegata* must give basis for the *probata* (Boone *vs.* Chiles, 10 Pet., 177); the court can consider only what is put in issue by the pleadings—averments without proofs and proofs without averments are alike unavailing (R. R. Co. *vs.* Bradley, 10 Wall., 303); a party can no more succeed upon a case proved, but not alleged, than upon a case alleged, but not proved. Foster *vs.* Goddard, 1 Black., 518. But, in the case at bar, there was before the Court of Appeals neither *allegata* nor *probata*—neither allegation nor proof that the appeal bond was insufficient in any particular, nor is there anything before this court to sustain the decree of dismissal except the allegations in that regard contained in the opinion of the court below, to which opinion, even if there had been evidence before the court below, this court can not look for conclusions of fact, unless the evidence from

which they are found are, also, appropriately made a part of the record here.

Ogden City *vs.* Weaver, 108 Fed., 566, and citations.

Keeley *vs.* Ophir Hill Mining Co., 169 Fed., 600.

York *vs.* Washburn, 129 Fed., 566, and citations.

Townsend *vs.* Beatrice Cemetery Association, 138 Fed., 381–2.

Pacific Sheet Metal Works *vs.* California Canneries Co., 164 Fed., 980.

Williams *vs.* Norris, 12 Wheat., 117.

Rector *vs.* Ashley, 6 Wall., 143.

Kentucky Life and Accident Insurance Co. *vs.* Hamilton, 63 Fed., 94.

New Orleans Ry. Co. *vs.* New Orleans, 14 Fed., 376.

State *vs.* Bamberg, 43 Md., 332.

Woods *vs.* Fuller, 61 Md., 460.

Mostin *vs.* Evans, 85 Md., 9.

Buckingham's Appeal, 60 Conn., 160.

15 Enc. of Pl. & Pr., 309.

England *vs.* Gebhardt, 112 U. S., 502.

Jurisdiction consists of the right to hear and determine, not to determine without hearing.

Windsor *vs.* McVeigh, 93 U. S., 274.

III.

No Objection to the Sufficiency of the Appeal Bond, Even if Apparent on the Record, Could Have Justified Dismissal at the Date of the Decree.

In the third place, the sufficiency or insufficiency of the appeal bond could not have been brought before the Court of Appeals, or made the basis of action by it, on

February 12, 1908, the date of the motion to dismiss, even if the appeal bond had been set out in the record, and if the latter, also, contained a motion to dismiss based upon its alleged insufficiency. No such objection could have been raised subsequently to August 6, 1907.

The requirement of an appeal bond in the case of appeals from the Supreme Court of the District of Columbia to the Court of Appeals of that District, rests, not upon any statute, but upon Rule X of that court, paragraph 4 of which rule provides:

> "If neither the bond required by the preceding second section for stay or *supersedeas*, nor the bond or deposit of money for security of costs required by the preceding third section, be given or made within the twenty days aforesaid, the appeal, if the transcript of record has not been transmitted to this court, may be dismissed by the court below, or one of the justices thereof, upon application by the appellee; or if the transcript has been filed in this court, said appeal will be dismissed here, *upon motion* of the appellee, *provided the motion for dismissal in this court be made within the first twenty days next after the receipt of the transcript in this Court.*"

As shown at page 34 of the record, the transcript was filed in the Court of Appeals on July 17, 1907; so that, under the very rule which provided the only requirement which exists for an appeal bond at all, any application to dismiss for failure to give it must have been made not later than August 6, 1907. No motion to dismiss, upon any ground, was made until February 12, 1908, and no motion was ever made to dismiss for want of a sufficient appeal bond.

That the rules of the court are binding upon itself, is well established, and has been more fully recognized by no court than by the Court of Appeals of the District of

Columbia itself. The rules of the court "are a law unto the court, as long as they remain in force."

Johnson *vs.* Wright, 2 App. D. C., 216, 220.

A rule—

> "has the force of law, and is binding upon the court as well as parties, and can not be dispensed with by the court to meet the hardship of a particular case."
>
> Talty *vs.* District of Columbia, 20 App. D. C., 489, 491.
>
> District *vs.* Roth, 18 App. D. C., 550.

In the case at bar, the attempt to dispense with it is, not to obviate, but to inflict a hardship, by the dismissal of a meritorious appeal upon a purely technical ground, and that one not even advanced by the opposing party.

> "A duly authorized rule undoubtedly has the force of law, and is binding upon the court as well as upon parties to an action, and can not be dispensed with to suit the circumstances of any particular case."
>
> Drew *vs.* Hogan, 26 App. D. C., 255, 263.

> "Courts have no dispensing power over their rules, and the party to whose prejudice an innovation upon a rule of court is made has the right of redress in an appellate court."
>
> Drew *vs.* Hogan, *supra*, p. 262 and citations.

> "The courts may rescind or repeal their rules, without doubt; or, in establishing them, may reserve the right of discretion for particular cases.

> But the rule once made without any such qualifications must be applied to all cases which come within it, until it is repealed by the authority which made it."
>
> Thompson *vs.* Hatch, 3 Pick., 512, approved in Rio Grande Irrigation Co. *vs.* Gildersleeve, 174 U. S., pp. 608–9.

This court has heretofore taken judicial cognizance of the rules of the lower court (Hovey *vs.* McDonald, 109 U. S., 156), and, it is presumed, will do so in the present case, there being no method by which, in a case like the present, the rules could be made part of the record. If, however, it should be objected that the court should not take judicial notice of them, the position of the appellees is not bettered; for, in that case, no legal requirement can be brought to the attention of this court for the giving of an appeal bond, and the dismissal for want of one could not be sustained. As above pointed out, the only requirement of a bond upon appeal from the Supreme Court of the District of Columbia to the Court of Appeals of this District is that contained in the rules of the latter court.

IV.

It was not Necessary that the Appeal Bond Should Run to the Defendant, Mrs. Padgett.

In the fourth place, it is submitted that it was not necessary to the validity of the appeal that the appeal bond should have been made to run to Mrs. Padgett, and this for two reasons:

In the first place, this defendant had not placed herself in such an attitude upon the record as required a bond to be given her in the event of appeal. Having precisely the same interests as the complainant, she elected

not to become a party complainant in the suit, sought no relief at the hands of the court, and by her answer contented herself with a mere admission of the facts alleged by the bill. That, under the flexibility of chancery practice, a person who is interested in the subject-matter of litigation on the same side with the complainant may be made a defendant (U. S. *vs.* R. R. Co., 98 U. S., 607) is a familiar rule; but no authority has been found, or is believed to exist, that such a defendant, in principle or in fact, *becomes* a complainant, for any purpose, or that a defendant is required, at his peril, so to deal with him.

If the rule of practice governing such cases be that such a defendant is to be regarded as a complainant, quite a number of practical results, not hitherto generally understood, would seem to follow. Under an order limiting the time to take testimony, the proofs on his behalf must be offered within the time allowed the complainant, and he will be at liberty, also, to offer further proofs in rebuttal. The complainant can not be *dominus litis* of his own suit, entitled to dismiss or to settle it, without the concurrence of such a defendant. The latter must either be bound by the admissions of the bill in the cause, which he has not made, or else, although to be regarded as a co-complainant, he may proceed in the case upon different and inconsistent claims from those of the complainant who filed the bill. If a defense of estoppel, or the like, be successfully made out as against the complainant on the record, such a defendant may nevertheless recover, without a cross-bill, unless equally estopped, in departure from the ordinary rule that all complainants must be entitled to recover, or none can do so. If the complainant loses, the decree for costs must be not only against him, but against defendants in like interests with him; if the defendant is a resident, the complainant, though a nonresident, can not be required to give security for costs, and so

on through out a number of resulting consequences, for none of which, it is believed, can precedents be found.

We submit that a party who, having interests in all respect identical with those of the comp. 'nant, nevertheless refuses to become a party complainant in the suit, or to seek relief of any kind in it, does not become an *actor* in the cause in such sense as to require another defendant, having a differing interest, to include him as an obligee in an appeal bond upon appeal taken in the cause, and, if not, then the sole ground upon which the decree of dismissal now rests fails, even if the supposed insufficiency of the appeal bond were competently presented in the record.

But, in the second place, an appeal bond approved by the court enures to the protection of all the appellees, although the names of some of them are omitted from it. Scruggs *vs.* R. R. Co., 131 U. S. App. CCIV, more fully reported in 26 Lawyers' Co-op. Ed., 741. The record of this case in this court shows that, as set forth in the last-cited report, the appeal bond was not executed by all the appellants, and it did not run to the appellee, J. H. Wiser. "Having been approved by the judge, it stands as security for all the appellees," and the motion to dismiss was denied.

V.

The Court's Denial of its Discretionary Power to Permit Amendment of the Bond was Error.

Following the first opinion of the court below, placing the dismissal upon the ground that summons and severance were necessary, the appellant prayed a modification allowing the appeal to be corrected in that particular, "and for such further proceedings as may be necessary

for the decision of the cause upon its merits" (Rec., p. 37).

Substituting, in its second opinion, insufficiency of the appeal bond for the then concededly erroneous ground for dismissing the appeal originally adopted, the court declined to permit amendment by correction of the old or substitution of a new appeal bond, in the following language:

> "While we regret to have to dispose of an appeal save upon its merits, we do not perceive how this motion can be granted. . . . To permit her to be brought in and made a party to the appeal would be to set aside the rule, which is the law of the court as well as of the parties."

An appeal will not be dismissed if in all other respects regular, where, through mistake or accident, no bond, or a defective bond, has been filed, unless the appellant shall fail to comply with an order to give the proper security within such reasonable time as shall be prescribed. Seymour *vs.* Freer, 5 Wall., 822. "Security for prosecution should be taken by the judge on signing the citation. But if this duty be omitted, or defectively performed, a remedy can be applied here on motion." Id., Jr., 823; and see Brobst *vs.* Brobst, 2 Wall., 96. See, also, the next succeeding heading of this brief.

If it be said that permission to correct a defective bond, in the appellate court, is discretionary, and that denial of the opportunity, like other discretionary acts, is not reviewable on appeal, the answer is that the appellant, assuming the objection that the bond should have run to Mrs. Padgett as well as to the complainant, was competent under the record, and well taken, was nevertheless entitled to, but was denied, the exercise of that discretion upon the part of the court below. That court, stating that the appellant had moved for leave to

file an additional supersedeas bond and citation to Mrs. Padgett and her husband said as above stated:

> "While we regret to have to dispose of an appeal save upon its merits, we do not perceive how this motion can be granted. . . . To permit her now to be brought in and made a party to the appeal would be to set aside the rule which is the law of the court as well as of the parties."

In Metropolitan R. R. Co. *vs.* Moore, 121 U. S., 558, 574–5, this court reversed the judgment of the General Term, the predecessor of the Court of Appeals of the District of Columbia, because of its refusal to consider a motion for a new trial based on the ground that the verdict was contrary to the weight of the evidence, that court having held, erroneously as was found by this court, that it was without jurisdiction to consider a motion of that character. This court, in reversing the judgment for that error, said:

> "The legal discretion of the Supreme Court of the District, whether sitting at general or special term, in granting or denying motions to set aside verdicts and grant new trials, is not by law submitted to the review of this court. The only point in judgment here is that the plaintiff in error was entitled by law to have that discretion exercised by the Supreme Court at general term, and that that court committed an error of law in refusing to consider his appeal from the order at special term denying his motion for a new trial, based on the ground that the verdict was against the weight of the evidence."

So, here, the court, declaring its reluctance to dismiss the appeal without a hearing upon its merits, did so upon the erroneous assumption that it was without jurisdiction or power to exercise any discretion in the matter of amending the supposedly defective appeal bond.

The learned court below, at page 44 of the Record,

falls into a curious error in its citation of Estis *vs.* Trabue, 128 U. S., 225, 229, for the proposition that an omission or a defect in an appeal bond can not be supplied in an appellate court. Estis *vs.* Trabue holds, on the contrary, that an error in the appeal bond may be corrected in the appellate tribunal, and the situation in that case which "could not be reached by amendment" was the absence of a proper summons and severance in order to admit of the prosecution of the writ by plaintiffs in error who were less than the whole number against whom the judgment below had been rendered.

The Court of Appeals in Slater *vs.* Hammacher, 15 App. D. C., 294, allowed summons and severance in that court, long after the time in which an appeal from the decree of the court below was allowable, under its own rules; but in the present case denied the power of an appellate court to permit the curing of a supposedly defective appeal bond, directly in opposition to the doctrine of Estis *vs.* Trabue, and of a long line of similar decisions by this, the court of last resort, on the ground that it was without power to do so.

In Insurance Co. *vs.* Pendleton, 115 U. S., 339, after an appeal had been heard and a decision and judgment rendered, this court of its own motion vacated the judgment to permit the service of citation upon parties below who were discovered not to have been cited, ordered reargument, and re-decided the case. The omission of citation, which *is* an essential part of the appeal, can not be a less important matter, or one more capable of amendment in the appellate court, than omission of or defect in the appeal bond, which is not an essential part, *ut infra.*

Where, of several severing appellants, one omitted to give any appeal bond until after the expiration of four years after the decree appealed from, her bond was permitted "to be filed *nunc pro tunc* as of the 26th day of

November, A. D. 1889, and her appeal to stand as perfected."

Shepherd *vs.* Pepper, 133 U. S., 626, 644–5.

Where a principal sued out a writ of error to a judgment against himself and his sureties, without joining the latter, and the writ was dismissed for this reason, a motion to review the dismissal and to restore the cause was granted upon the terms of amending the writ of error by inserting the names of the sureties.

Inland & Coasting Co. *vs.* Tolson, 136 U. S., 572.

VI.

Finally, it is submitted, no appeal bond at all was essential to the validity of the appeal.

Section 22 of the Judiciary Act (U. S. Rev. Stats., sec. 100) requires the giving of such a bond in the case of appeals to this court. Upon a motion to dismiss, on the ground that no bond at all had been given, this court, in Martin *vs.* Hunter's Lessee, 1 Wheat., 361, said:

> "We consider that provision is merely directory to the judge, and that an omission does not avoid a writ of error. If any party be prejudiced by the omission, this court can grant him summary relief by imposing such terms upon the other parties as, under all the circumstances, may be legal and proper."

In the present case, there was no statute requiring appeal bonds in the case of appeals from the Supreme Court of the District of Columbia to the Court of Appeals of the District, that requirement resting simply upon rule No. X of the latter court. The validity of the rule, of course, may be readily conceded; but it must doubtless also be conceded that it does not require or

admit of a more rigid construction than an act of Congress.

> "A prayer for an appeal made in open court and an order allowing it constitute a valid appeal. Under such circumstances the allowance becomes the judicial act of the court in session, and the bond is not essential to the taking of the appeal, though it may be to its prosecution. . . . 'It could have been given here, and cases have been brought here where no bond was approved by the court below, and the court has permitted the appellant to give bond in this court.'"
>
> Pugh *vs.* Davis, 110 U. S., 227–8, citing
> Edmonson *vs.* Broomshire, 7 Wall., 306, and other cases.

It is respectfully submitted that the decree appealed from was erroneous in each of the particulars specified by the assignments of error, and that it should be reversed and the cause remanded for hearing upon its merits.

J. NOTA McGILL,
J. J. DARLINGTON,
Solicitors for Appellant.

TAYLOR *v.* LEESNITZER.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 45. Argued March 8, 1911.—Decided March 20, 1911.

Although generally slow to overrule decisions of courts other than those of the United States on questions of local practice, this court will do so where, as in this case, the court below yields a consideration of the merits to form and takes too strict a view of its own powers.

When an appeal is taken in open court, all parties are present in fact or in law and have notice; formalities are not needed to indicate that it is taken against all parties.

The requirement of a bond in the Court of Appeals of the District of Columbia does not go to the essence of the appeal, and the form should be objected to within twenty days; and where the appeal was taken in open court, objections to the form of bond cannot be taken on a motion to dismiss the appeal filed six months after the appeal was taken based on defects in the appeal.

Although too late for an appeal to be dismissed on account of the form of bond, if the proper parties are before the court, leave can be given to file an additional bond if desired.

31 App. D. C. 92, reversed.

THE facts are stated in the opinion.

Mr. J. J. Darlington, with whom *Mr. J. Nota McGill* was on the brief, for appellant.

Mr. Edmund Burke for appellee.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an appeal from a decree of the Court of Appeals of the District of Columbia dismissing an appeal from a

decree of the Supreme Court. The bill was brought by the appellee Leesnitzer, as one of the heirs of Thomas Taylor, for a partition between herself and the other heirs of lands acquired by Taylor after the execution of his last will. By the will Taylor left all his estate, both real and personal, to his widow, the appellant. See *Bradford* v. *Matthews*, 9 App. D. C. 438. *Crenshaw* v. *McCormick*, 19 App. D. C. 438. Code D. C., § 1628. *Hardenbergh* v. *Ray*, 151 U. S. 112. The bill, of course, was adverse to the appellant's right under the will, and also prayed that she might be declared barred of her dower. See *Clark* v. *Roller*, 199 U. S. 541, 545. After a trial there was a decree for the plaintiff "unless the defendant Margaret E. Taylor shall perfect her appeal from this decree, which is prayed by her in open court and allowed, by giving a supersedeas bond in the penal sum of One Thousand dollars." The decree was filed on May 28, 1907. On June 3, 1907, an appeal bond was filed, but in accordance with the rules, under ordinary conditions, was not printed in the transcript of the record sent to the Court of Appeals. The record was filed in that court on July 17, 1907. On February 12, 1908, the plaintiff Leesnitzer filed a motion that the appeal be dismissed, because 1. Elizabeth E. Padgett, an heir and one of the defendants, "has not been joined either as an appellee or appellant or as a party hereto. 2. That there has been no summons and severance, or service of notification of appeal upon said Elizabeth E. Padgett. Edmund Burke, solicitor for appellee." This motion was granted, on the ground that Mrs. Padgett was not made a party to the appeal.

Thereupon the appellant moved to modify the decree by allowing the appellant to correct her appeal by citing the omitted parties and for such further proceedings as might be necessary to a decision of the cause upon its merits. The court held that as Mrs. Padgett had admitted the allegations of the bill and had arrayed herself

on the plaintiff's side, and as she had got all that she could expect by the decree, the appellant did not need to obtain a severance, but that the appeal should have been taken against her as well as against the plaintiff and that the supersedeas bond should have run to both, which 'an inspection of the bond in the office of the clerk below' showed not to have been the case. It was objected that the court could not look beyond the record before it, which, as we have indicated, contained only a memorandum that a bond had been filed. But the record was entitled 'Margaret E. Taylor etc. *v.* Mary J. Leesnitzer' until within a few days before the case was called for hearing, when the appellant *ex parte* caused the cover of the printed record to be changed so as to name also Elizabeth E. Padgett and Franklin Padgett as appellees. It was said that if the court should confine itself to the record the presumption was that the title of the appeal followed the obligation of the bond. On this ground the court, with expressions of regret, considered itself not at liberty to entertain a motion for leave to file an additional bond.

We generally are slow to overrule the decisions of courts other than courts of the United States upon matters of local practice. But as the Court of Appeals unwillingly yielded a consideration of the merits to what in the circumstances probably was little more than form, we feel less hesitation than otherwise we might in acting upon our opinion that it took too strict a view of its own powers. The first decision went on the ground that Mrs. Padgett was not made a party to the appeal, and, if we correctly understand the second, it also seems to have stood on the same notion deduced as a conclusion from the form of the bond, as disclosed by inspection or presumed. No other was open under the motion except one discarded by the court as we have shown, and no other was or was likely to be taken by the Court of Appeals. But this ground cannot be taken on the record,

because the decree in the Supreme Court states that an appeal was prayed in open court.

When an appeal is taken in open court it does not need the formalities of ancient law to indicate that it is taken against all adverse interests. All parties are present in fact or in law, and they have notice then and there. No citation is required. *Chicago & Pacific R. R. Co.* v. *Blair*, 100 U. S. 661. *Brockett* v. *Brockett*, 2 How. 238. The requirement of a bond by a rule of the Court of Appeals does not go to the essence of the appeal, as is shown by the condition in the rule that the motion to dismiss for want of one must be "made within the first twenty days next after the receipt of the transcript in this Court." Rule X. As the parties in this case had notice of the appeal, they were put upon inquiry as to the scope of the bond, and if, as the Court of Appeals says, there is a presumption that the title of the transcript follows the obligation of the bond, they had actual notice of its form. But the bond cannot create a retrospective presumption as to the effect of the words spoken in open court on the scope of the appeal. That was settled when the appeal was claimed. It follows that no excuse is shown for not objecting to the form of the bond within twenty days. The motion to dismiss was not made until more than six months after the receipt of the transcript, and then was not based on the defect of the bond, but on supposed defects in the appeal. It was not made on behalf of the party aggrieved by the omission from the bond. The time has gone by when the appellant can be turned out of court because Mrs. Padgett was not joined as obligee, but if, as we have tried to show, the proper parties were all before the higher court, no doubt leave would be given to file an additional bond if an amendment were desired.

Decree reversed.